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DROIT ADMINISTRATIF.[1]

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A FRENCH jurist who seeks to explain to the English public the principles governing administrative law as they are understood in France, is beset at the same moment by conflicting feelings of uneasiness and confidence. He recollects at the outset that, according to a classical doctrine which has been true for a considerable time and which is expressed in Dicey's works in the most brilliant formula, England does not possess to any extent in its legal organization a system of ideas which could have any claim to be compared to the French *droit administratif* or indeed could be regarded as parallel to it with any exactness. Is it not therefore presumptuous for a Frenchman to attempt to explain to English lawyers the leading characteristics of an institution which might certainly appear to them unusual, if not grotesque? And yet when a traveller has stayed a short time in Great Britain, has talked with the recognized authorities of that country, has asked questions, has made notes, has dipped into the recent works on English law, has glanced with an unprejudiced eye at the whole trend of legal institutions at the present day, he cannot help being struck by a certain lack of harmony between the official doctrine, which for such a long time has had good reason to say that there is no administrative law in England, and the judicial practice

[1] The summary of a lecture on ' Une vue d'ensemble sur le droit administratif français ' delivered to the University of Cambridge on October 26, 1928. Translated by the Editor *C. L. J.*

which, owing to the creation of new jurisdictions, to the introduction of new forms of procedure, and to the needs originating in the obvious inadequacy of inherited views, seems to pave the way for the introduction into England of a *droit administratif* and the recognition of principles derogatory to the common law—principles which are adapted to playing in English law the part which *droit administratif* played in the French common law during the nineteenth century, and still plays. I am convinced that this far-reaching movement which is intimately connected with the development of institutions and social life in England, and which has been quickened by events following on the war, is only in its infancy. It will certainly meet with opposition, but I believe that study of French *droit administratif* may reassure our neighbours. In France, too, palpable hostility has arisen in the name of the common law against an autonomous system which has borrowed from the civil law neither its methods nor its texts. It has been decried as arbitrary. And indeed the danger with us was very great, because liberty was, in this matter, inadequately protected and the coming of the new law coincided with the destruction of the old traditional system and the establishment of the Napoleonic institutions. Planted roughly by the hand of a dictator on a soil ploughed by revolution and barely smoothed by the heavy roller of the imperial régime, it might reasonably have been feared that the tree of *droit administratif* would stifle all liberty under its shadow. Experience has shown how empty these fears were. To-day *droit administratif* has no longer any enemies in France. It is thoroughly acclimatized, and what was once apprehended as a peril to liberty has now by a remarkable turn of fortune become the most reliable safeguard of liberty in our country. We shall see in the course of this article how this extraordinary change of view has come about. It is interesting to note that while France of the nineteenth century, much shaken by her Revolution, feared that the establishment of *droit administratif* might be the death-blow of individual liberty, England of the twentieth century, fenced by her age-long institutions, by her traditional wisdom, by her powerful judicial system, can watch untroubled the coming of a new body of law.

What is *droit administratif*? It consists of all the legal rules governing the relation of public administrative bodies to one another or to individuals. In England, according to tradition, it does not exist, because the agents of the Crown are not, in theory, subject to any laws other than those which

govern private persons. In France, on the other hand, our starting-point is the dual nature of rights emphasized so strongly by the Roman jurists, and we recognize that public interests are not, as such, regulated by the legal system dealing with private matters. While private law is essentially a law of equality where all persons find themselves on the same level, subject to the same laws and the same judges, *droit administratif* figures as a law of inequality which recognizes and deals with two distinct classes—on the one hand, officials invested with exceptional prerogatives, nay with real privileges; on the other hand, private individuals compelled to submit to this official dominance.

An example will clearly show this distinction between ordinary law, or the law of equality, and *droit administratif*, or the law of inequality. A fundamental rule of every legal system is that no one is allowed to take the law into his own hands. A creditor has no right to recoup himself by opening his debtor's safe and taking sufficient from it to clear the amount which the debtor refuses to pay. What ought he to do? He must go to the proper judge, get a judgment from him backed by a decree of execution, and apply to public officials who, acting on the judgment, will see that he gets payment of what is due. This elementary, fundamental rule has no application to public administrative offices. They can take the law into their own hands, and have no need to apply to a judge in order to enforce their rights. From the very first they can confer upon themselves modes of execution which a private person must seek from the Court or from a notary. Taxes are recoverable by forms of process made effective by the *préfets*. Ministers can recover officially all the debts of the State and the claims of the departments by similar proceedings. If the State and its deputies are thus released from the compulsory intervention of a judge, it is because of a notable privilege which presumes it to be invariably right. Of course its infallibility is not absolute and is capable of being negatived by proof to the contrary; but any one who opposes an official is always compelled to assume the invidious and difficult position of a claimant. On him, therefore, falls the burden of proof. He will not succeed in freeing himself from the administrative grip, unless he can satisfy the proper judge that the official whom he accuses has overstepped the limits of his powers.

Of course the claimant will get justice done to him, but only if he has made out his case before the special judges recognized by *droit administratif*. Their jurisdiction is organized

in a peculiar fashion totally distinct from that of the ordinary Courts, and it is this which has given to our *droit administratif* its unique character. It is inevitable that the creation of such an autonomous body of men should produce a certain attitude of mind. In a group of men of much the same antecedents, who have been chosen because of their fitness for filling high positions and who have been clothed with peculiar authority, there will always grow up with the realization of their joint responsibility for the public welfare what is commonly known as *esprit de corps*. In matters of jurisdiction, this *esprit de corps* displays itself in a special mode of approaching such problems as arise and, as a consequence, in the process of solving them. What has been responsible for the development of *droit administratif* is not so much the law itself as the administrative jurisdiction organized in the year VIII (1799—1800), which has been constantly growing and gaining strength. Administrative jurisdiction has been completely severed from the ordinary tribunals (which are all under the control of the *Cour de Cassation*) and forms a distinct system of judicature answerable only to the *Conseil d'Etat*. This was set up as a supreme Court and has worked without interruption for more than a century. It has thus built up, by means of a purely praetorian system, an autonomous body of law comprising special rules. We may now note its leading characteristics.

Let us observe at the outset that it is a new sort of law, and this feature separates it markedly from our civil law, whose roots penetrate very deeply into our earliest history. While the *Code civil* is a gradual product of our development and embodies elements traceable to Roman law, Germanic law and canon law, *droit administratif* appears as the fruit of very recent political evolution. While it is absolutely impossible to fix the date of the birth of our civil law, it is quite easy to allot the foundation of *droit administratif* to the period following the outbreak of the French Revolution (1789) and the re-establishment of order by Bonaparte in the year VIII.

It is entirely implicated with the revolutionary reaction against the abuse of judicial power during the eighteenth century. The old customary constitution of France had recognized the right of Parliaments to control the exercise of royal legislative power by laying down the rule that royal edicts would apply within their sphere only if they had been registered by them. In this way they could raise protests against the royal power which the king could override only by the process known

as *lit de justice*. By this he was compelled to come to Parliament in person and enforce his wish there. On the eve of the French Revolution, Louis XVI felt the necessity of completely altering the traditional French constitution, and approached the great reformer, Turgot, for this purpose; but the proposed reforms had to be abandoned owing to overwhelming opposition organized by the Parliament of Paris. It may be said that in France, at the end of the eighteenth century, the spirit of conservatism and routine prevailed much more among officials than at the royal Court.

Members of the Constituent Assembly had witnessed this Parliamentary struggle against the spirit of reform, and, being for the most part lawyers, they realized what tough opposition could be raised against the best established legislative or administrative measures by the hostility of judges. It was to a thorough appreciation of this danger that the doctrine of the separation of powers owed its birth—a doctrine which the Constituent Assembly embodied in these terms: 'The Courts are forbidden to interfere with administrative functions.'

An impassable barrier was set up between the region of administration and that of tribunals. The judges appointed by the new power neither had, nor could have, any right to scrutinize administrative authority.

This preliminary point having been settled, the next question which the French *constituants* had to solve was this: Ought administrative action to be entirely free from judicial control, and would it be wise to allow it unfettered discretionary power? If yes, then a real tyranny would have been introduced into our administrative system. This question was deliberately shelved, principally because men recollected the old regime, which recognized, besides the ordinary justice of the Parliaments, a purely administrative justice belonging to the *intendants* and, on appeal, to the *Conseil du Roi*. All these institutions had disappeared in the revolutionary whirlpool, and it would have been very difficult for the *constituants* to impose upon the administration a judicial control other than that of the ordinary tribunals. At first, in 1790, a stop-gap plan was adopted which could not last for long. Local bodies called *directoires* were entrusted with the cognizance of administrative disputes. This system confused two essentially different things—discussion and jurisdiction; and it handed over to persons who, because they had been elected, were fatally prejudiced, cognizance of the most delicate questions. This yielded unsatisfactory results, and one of the first reforms of Bonaparte and the legislators of

the year VIII was to organize, under the name of administrative justice, a scheme of jurisdictions which were independent of the judicature and free from the control of the *Cour de Cassation*. They were composed of magistrates, busied with administration and full of administrative zeal. The scheme therefore would seem to offer the most reliable guarantees for both technical ability and complete impartiality. It embodied two grades of jurisdiction. In each department was a *Conseil de Prefecture* (the number of these has been reduced by the decrees of Poincaré in 1926), and, on appeal, a *Conseil d'Etat*. At the outset, these *Conseils* possessed only consultative functions; the *Conseil d'Etat* in particular appeared theoretically as a kind of judicial commission whose duty it was to assist the chief of State who alone had the right of decision. It was not until the law of May, 1872, that the *Conseil d'Etat* acquired supreme jurisdiction and ceased to be the technical assistant of the chief of State. Thenceforth, just like the civil Courts, the *Conseil d'Etat* discharged the functions of 'delegated justice' quite independently of governmental functions and of actual administration. It is indeed since 1872 that the principles laid down by the French Revolution and organized by the Consulate in the year VIII have been consolidated as specialized institutions. The law of 1872 and the growth of legal principle which it has fostered have given to this new rule of *droit administratif* a character of its own.

A second characteristic of our *droit administratif* which contrasts it sharply with civil law is that it is not codified. The codification of private law and of penal law which occurred under the Consulate and the Empire has had considerable influence on legal ideas prevalent throughout the nineteenth century. Codification means an inevitable pause in the growth of the law. The authors of a code are naturally inclined to consider their work as a monument of legal literature which almost completely stabilizes the law at a given moment. It is said that when the first commentary on the code appeared, Napoleon cried out with a gesture of annoyance, 'The fools! They are going to spoil my code!' So strongly were he and his contemporaries convinced that in the mere fact of codification was a kind of mysterious virtue capable of satisfying every need of the spirit of the law! In fact, a great deal of the nineteenth century was taken up entirely with interpretation of this 'sacred book,' and it is only in the last generation that we have realized the impossibility of stopping or crystallizing the growth of the law by a written document, however complete it may be.

Droit administratif most fortunately escaped the fever of codification that characterized the Napoleonic era. Indeed, extremely numerous laws—almost as intricate as English laws—have resulted in a meticulous control of the administrative system. But they have no roots in the past or in tradition, and have not in any way (like civil laws) set up any general principles for the guidance of the commentator or the judge. What they have given us is a fragmentary collection of solutions to problems. The upshot is that these texts, incomplete and empirical, have left great gaps in which case law and legal literature have complete freedom to develop, unhampered either by legislative rules, which do not exist, or by legal principles that have been elaborated long ago. In less than a century a complete legal system has sprung up and developed, which has bridged the gaps of uneven legislation. It is destitute of historical background, but is possessed of an astonishing freedom of movement. It has a wealth of sources, but a poverty of legal principles. So statute law, which in France is usually the first thing in legal thought, is in this point completely thrust into the background. In *droit administratif* it does not in any sense play the part of a creator of rights, but merely marks the limits beyond which neither judge nor commentator may venture.

Finally, French *droit administratif* is, compared with the common law, autonomous in character. We have already noticed the two essential things which have been responsible for this autonomy—the existence of separate Courts, and the recognition of a legal inequality set up in the interests of the administration to enable it to execute as effectually as possible the public services. Thanks to these two causes—the first a matter of external order, the second a question of organizing juridical relations—French *droit administratif* exhibits, in fact, a peculiar feature as a consequence of what we have said. Unquestionably the men of the year VIII would have been greatly surprised if any one had foretold to them the unexpected forms which *droit administratif* was destined to take; but it must be confessed that these developments, though caused by the slow and steady influence of our *Conseil d'Etat*, were implicit in the original ideas of the separation of powers and administrative supremacy. These conceptions which might have assumed a brutal and tyrannical shape have, as a matter of fact, been softened and, as it were, humanized owing to the patient control which the *Conseil d'Etat* has exercised over administrative action from the legal point of view.

In order to give foreign readers some idea of this system of law I will select two of its leading principles; first, the responsibility of public administrative offices; secondly, the avoidance of irregular administrative acts.

For a long time the idea that public administrative responsibility should manifest itself in stifling the complaints of injured persons by indemnifying them appeared merely fanciful. Of course the ordinary Courts, which are competent to take cognizance of purely private acts affecting the welfare of individuals through the agency of the State, the departments, or the *communes*, have on various occasions condemned these official persons by applying the rules of private law. But that redress was strictly limited. The normal action of the State and its deputies, which is concerned with the operation of the various public services, was beyond the ken of the law and its general rules relating to responsibility. We cannot possibly trace in detail the growth of this legal theory which, at first tentatively and then with increasing assurance, has substituted a completely different rule for the old dogma of the irresponsibility of public power. Nowadays the rule is—though it has no foundation in any legal enactment—that administrative offices are liable to individuals for damages caused by defective working of the public services. The idea of *faute de service* has replaced the idea of irresponsibility.

This gradual change could be attained only by the steady influence of a *Conseil d'Etat*, itself an organ of administration, absorbed in administrative work and imbued with the administrative spirit. Such a change could never have been effected by any external judicial body working outside the province of administration. It was only a well-recognized magistracy, which was free from any suspicion of partiality in the exercise of its power, that could have sufficient weight to make public authorities accept the principle of responsibility. Thus, in France at the present day, we can lay it down as a general rule that every one who is injured in his person or property by any wrong-doing on the part of the public services can recover compensation adequate to his loss, provided that he can prove to the satisfaction of the *Conseil d'Etat* the damage and wrong-doing. The annual collections of the judgments of the *Conseil* contain many decisions which illustrate this solution of the problem.

Three points should be noticed with regard to this responsibility:

(1) What the *Conseil d'Etat* applies is not the rules of the

common law, of private law, but simply the principles of justice by which these are inspired. The *Conseil*, an administrative organ, has been at pains to declare repeatedly that the responsibility of the State and its deputies is not to be regarded as in any way comparable with that of a private individual, but that it has peculiar rules adapted to the requirements of each service and capable of modification by the *Conseil* accordingly.

(2) Some acts of public authorities are not amenable to litigation in connexion with responsibility. They are styled *actes de gouvernement* and cannot be made a matter of compensation at the expense of the State. Such, in particular, are diplomatic acts which assume the interference of a foreign State. The list of these exceptional acts can be definitely ascertained by means of the case-law of the *Conseil*.

(3) Conversely, the operation of some of the public services entails a somewhat wider responsibility. The victims of injuries caused by these services are released from the necessity of proving wrong-doing on their part, and it is enough if they merely establish the injuries. Such especially are the claims brought against various public administrative bodies by those who may have been injured in person or property by reason of public works. The theory is that such operations are quite likely by their mere extent to upset a whole district, and that those who have caused them ought to be liable independently of any question as to whether they were at fault or not.

We must note in conclusion the method of redress which is open, free of charge, to all who may consider themselves aggrieved by any act whatever of the public authorities, where it takes the form of unjust prohibition of a procession by the mayor of a village, or of a decree of the President of the Republic in connexion with the general police of the district. This redress, modified by remedies for excess of powers, enables every one subject to the administration, who has been prejudiced in his lawful interests by reason of such an act, to demand annulment of the measure by the *Conseil d'Etat*. For more than a century the *Conseil* has worked unremittingly to enlarge this remedy. And it still protects threatened interests with as much authority and capacity as, by virtue of its being an important factor in the administration, it has employed its prestige in imbuing all administrators with respect for fundamental legal principles. In fact, the *Conseil* welcomes the claims which, within the allotted two months following the publication or notification of the impeached order, are brought before it alleging lack of competence, irregularity of form,

breach of law, or abuse of power. Thus it represses the particularly insidious vice in administration of improper direction of administrative energies; such are police measures applied in the financial interests of the administration, or for the purpose of unjust discrimination against special classes of citizens.

It need scarcely be said that I make no claim to have given you even an outline of French *droit administratif*. My much more modest wish has been to invite you to a brief legal study of a praetorian system born by force of circumstances when codification was at its zenith.

THE LAST FORTY YEARS OF THE IRISH BAR.[1]

Serjeant A. M. Sullivan, K.C.

FORTY years ago in my old country the legal world was in a state of transition. The old order was changing in a great number of ways. The Judicature Act had just got into swing and although four Courts still opened in the hall beside the Liffey they were soon to be fused into one. These were at that time the Court of Chancery, the Court of Queen's Bench, the Court of Exchequer, and the Court of Common Pleas, and the doors of these four opened on the Central Hall and their names stood over them. The Court of Chancery stood by itself, but it was thought in those days that you had your choice of three Common Law Courts in which to have your case tried. If you had some merit on your side but thought that the law was against you, you issued your writ in the Queen's Bench, which was presided over by Mickey Morris, as he was invariably called although he was a lord, because Mickey had a good deal of common sense, a great deal of humanity, but his ideas of jurisprudence were peculiarly his own. On the other hand, if you were strongly of opinion that however iniquitous your client was, he had the law on his side, you issued your writ in the Court of Exchequer, presided over by Christopher Palles, the greatest judge before whom I have ever appeared. Christopher Palles decided according to what he believed to be the law, and would pay no attention to any other consideration that might be advanced before him. On the other hand there was a third course: if you had neither law nor merits you went to the Court of Common Pleas, which in that day was presided over by Chief Justice May, before whom no case was certain and no case was hopeless. Accordingly there you took your chance, and you had a very good one, whatever was the state of affairs.

There were other changes coming into vogue. The practice of law had been, one might almost say, the property of the wealthier classes. There was one good thing about the legal profession during the whole of the nineteenth century in Ireland, and certainly in the last forty years: it was not a money-making

[1] An address delivered to the Cambridge University Law Society, November 23, 1928.

trade, and there were never in my recollection discussions of a bitter character either in public or in private as to the enormous fortune that might be made at the Bar, because fortunes were not to be made. The practice of the law in the time that I speak of, forty years ago, was just passing out of the hands of the representatives of the class of landed gentry. It was only in the 'eighties that there was an incursion into the legal profession of men, who, like myself, had to fight their way and pay their way to the Bar through occupations in some other walk of life.

A new régime was making its appearance in the country. Litigation was no longer indulged in by the landed gentry, except the litigation that was forced upon them by the unfortunate agrarian agitation and the state of affairs that prevailed in the enforcement of the payment of rent; but the squireen class that figured so largely in the pictures of Ireland drawn by Charles Lever and the story tellers of his day, and the small landed gentry had been completely wiped out of existence by the Land Acts of 1881 and 1887, which had created a peasantry permanently fixed in their holdings and in their farms, endowed with property by law, and endowed with the spirit of litigation by a beneficent nature.

To meet this state of affairs there had been instituted some years before, and there was in full swing with us, the County Court system. It was a great blessing to the country. The old institution of Quarter Sessions in Ireland had become amalgamated with the civil jurisdiction; the old Chairmen of Quarter Sessions and the old Recorders had all been swept away and a reform which was intended to come to England afterwards, but has not reached England yet, was made; the new County Court judges had both civil and criminal jurisdiction, and accordingly there was a rapid general gaol delivery, perpetually moving through every county, which was a great benefit to the country. The great thing about it was that litigation was cheap, incredibly cheap to one who lives in this country, because recent discussion would seem to imply that in order that justice may be good it should be enormously expensive. I do not subscribe to that, and in the County Courts in Ireland litigation was so cheap that the natural proclivity of a gay man to settle disputes by breaking his neighbour's head was curbed by the economy and effectiveness of bringing a County Court action instead; for a dispensary doctor, a pleasant climate and a good constitution might mend the neighbour's head for nothing, but if he swore a right of way across his farm it would blister him

and his heirs for ever. For less than 25s. a suit could be brought. A suit could be brought for £5 in the County Court for about 12s. 6d. Up to £10—which is an immense amount—a fully-blown 'counsellor' could be had for 10s. 6d. or a guinea; or if people were gambling extravagantly for enormous sums of £20 or upwards they would have to pay their counsel two guineas and then, whatever their County Court judge did, they had the right of appeal to the Lords Justices of Assize, one of whom would try the case over again. Of course the County Court sat at the people's doors and witnesses were no expense, and even at the assizes these cases would be tried before men of the eminence of Christopher Palles and Fitzgibbon, as good judges as could be found anywhere, and the cases tried at a cost of less than £5 a side. I venture to think that justice was done no less effectively for that small sum of money than by the expenditure of enormous sums of money by other people in other places. I think it was a good thing that such a profession held out little chance of a man making a fortune. It attracted no man for the purpose of making money, and the attraction of a profession ought to be itself, and not its money-earning capacity, for any man fit to march in its ranks.

One thing, which even the new world and the new generation and the new class speedily learned from the old tradition, ought to be learned by every man who contemplates the law as his profession, is that the barrister is an independent officer in the administration of justice. His office and his dignity are no less than the office and dignity of the judge. He functions for a different purpose, but he contributes as much to doing right and to maintaining law and social stability as any other officer, no matter in what position in Court he sits and no matter what his emoluments may or may not be; and the independence of the Bar and the appreciation of the independence of the Bar is the bedrock foundation of public confidence in the true administration of justice, and the position of the barrister is one to which any man should be proud to attain, and in the practice of which any man should be proud to spend his life even though he lived and died a poor man.

It was a peculiarity of the Irish Bar that we had no chambers and we had no clerks. The life of the Bar was a life of intimacy which I think members of the University would appreciate. Having no chambers in the High Court of Justice in Dublin, if you were long enough at the profession you might prescribe to a desk in the Law Library and when you were not actually engaged in Court you sat at your desk in an immense chamber

in which the walls were lined with books and all the reports and textbooks required for professional work were available. At the door was a man in a pulpit, who shouted out the name of any barrister who was summoned to the door by a solicitor to receive a brief. He dealt with the solicitor direct without the intervention of a clerk. The junior barristers, even if they were not engaged in a case, went into the Courts in their wigs and gowns and spent their days in the Courts learning their business—a practice which is not followed in England as much as it ought to be. For it is only in watching business being conducted and in that alone, not through books, that the practice of the law and the meaning of the law can be learned.

Life in the library was in theory absolutely demoralizing. How a man could work with the incessant buzz and noise of conversation—sometimes directed to himself—might appear to be a puzzle, but somehow or other you get used to anything and your ear gets trained to shut out all sounds but the one it wants to hear, and you can carry on a conversation and write an opinion at the same time when you have practised doing this for a sufficiently long period of years. Generally you could go and work there with people reciting the latest gossip, and even speaking to yourself, without hearing a sound. But there was one sound you never missed: what John Stuart Mill might have called your enlightened self-interest always detected the sound of your own name, with the hope of a brief behind it.

Then in the County Court life was extremely intimate among the members of the Bar who followed the Court from place to place. Even in the Law Library when a certain amount of dignity might be expected to attach to persons of age and title, the youngest junior called you by the same name that your oldest chum called you by, and if you had not a nickname you were called by your Christian name: but that he addressed you in any formal manner was absolutely unknown, and from end to end of the profession the terms on which we lived were terms of intimacy. Every man had to sit and listen to a criticism of himself, and he might not resent anything which was said to him whether it was half jest or wholly earnest. He knew what his profession was thinking about him, and he did not lead the Irish Bar if the Irish Bar did not choose to be led by him—a very good thing which helps a man to maintain the same constancy and size with his hat on.

The first thing for a junior to do was to attach himself to the County Court, because there the relations between the two branches of the profession were so close that a junior barrister

was always given a chance to display his ability in Court. It was a tradition of both branches of the profession that new juniors were to be given an opportunity of showing themselves when first they appeared at Quarter Sessions. Accordingly, if they made good they got on, and if they did not certainly no blame attached to their colleagues at the Bar, who always were ready to give a trial to the newest recruit who joined the Quarter Sessions, a very excellent rule that developed many a good man in my day.

Of course the sort of law you got in the County Court depended on the judge, and in my early days the County Court system had taken over as a going concern a certain number of old gentlemen who had been chairmen of Quarter Sessions, and there were three or four whom I remember very well. Whenever a man got a job in Ireland, with a salary attached to it, he kept it as long as he could—no one ever resigned a salaried position; and thus it was. I remember very well that the County Court of Clare was presided over by a most charming and delightful old gentleman. He had about eighty or ninety days' work in the year, he was paid £1,600 and allowances, which made it about £1,800, he was allowed to appoint any junior relative, no matter how small and however incompetent, to be his Registrar, and he lived in France when he was not discharging his duties as a County Court judge in Clare. When I first appeared before him he was only ninety-one years old: he was quite good except for one thing; he was so short-sighted that though he could write beautifully he could not see beyond the edge of his desk, but that really did not much matter. When you go into the Courts you often hear people talking about the advantage of seeing and hearing the witness. He could hear the witness, but he had not seen a witness for years. When I appeared before him, to make up for that he had as his Registrar a Clerk of the Peace who was the Civil Officer, a gentleman who supplied his defects, because what used to happen was this. The Clerk of the Peace, whom we will call Henry, would see a friend of his in Court. Henry, when I was there, had a large waste-paper basket full of apples and a jack knife which he used for peeling the apples and putting large chunks into his mouth. During a case this is what happened. Henry would say, 'That's all your Honour—fine 12s. 6d., that's good enough.' The judge would say, 'A very small amount: make it £1, Henry.' Henry would say, 'Let's make it 15s., your Honour.' The Clerk of the Peace would look through the cases and say, 'Mr. Mulcahy, why are you waiting there, what is

your case?' The judge would say, 'What's that?' Henry would say, 'I said that the next case was No. 97,' but the judge would say, 'But Henry you said the last case was No. 23.' Henry, 'Yes, your Honour, but the next case is No. 97.' And Mr. Mulcahy would come up and be sworn and the judge would say, 'Henry, who is this?' Henry, 'Your Honour knows him very well. He is an excellent man, your Honour, you can trust every word he says.' Then Mr. Mulcahy would state his case, and Henry would say, 'Who is defending this case?' and a little gentleman would say, 'I am defending.' Henry would say, 'Who is the defendant?' 'The defendant is Peter Scanlan.' 'Sure I know that.' 'He lives at Dessart.' 'I can see that from the Civil Bill book. Is he that fellow with the slant eye.' 'Yes.' 'Tell me, is he that fellow that gave evidence about a goat at the last Assize?' 'He is.' 'Has that chap the impudence to come into this Court again? Well he can get on with it.' But he would not get off with it. All cases were conducted on a similar basis. For Henry was an excellent judge!

The County Court judge in the adjoining county was named Purcell: he had not reached the age of ninety. His peculiarity was he used to appear to be asleep all the time he was doing his business, but when some unusual form of perjury was introduced by a witness he delivered a shrill whistle. He was under the delusion that the State entitled him to be called 'My Lord': if you addressed him as 'Your Honour,' he whistled again as if he did not believe you.

The County Court judge of Tipperary, which was next to Limerick, was a gentleman named Ryan. I have never practised before him, but Lord Carson used to do so, and he told me that one day he met Ryan on a platform at Tipperary Station and said, 'Well, Judge, had you an interesting case in Court to-day?' Now poor Judge Ryan was stone deaf. 'Eh?' he said. Carson shouted the question again. 'Oh, yes, a very interesting case. I am not certain what it was about; I think it was a choral society complaining about an instrument: I suppose it was a harmonium.' The next morning Carson discovered that it was an action about the price of a Singer's sewing machine.

Well, in the county of Cork was Sir John Chute Nelligan. He had been in nine different counties and had been brought up on replies, rejoinders and bills of exception, and things of that kind which sound like antediluvian reptiles. But Nelligan was extremely careful in the way in which he discharged his

duty. Always piously inclined and prefacing his judgment with the ejaculation 'God bless my soul!' he used to say, 'If I exceed my jurisdiction some man will bring an action against me.' The first thing he would be sure of was that the Civil Bill process had been served. Now of course if it was served personally on a man, Nelligan could pick no quarrel with the process server, but if it was served in any other way he used to spread himself to find out whether he had jurisdiction in this particular case and you would hear a colloquy between the Recorder and the process server, and the process server would stand up and say he had served the process on the defendant's wife and the judge would say, 'You swear that the lady is his wife.' 'I believe so.' 'But you have just sworn it.' 'Well, your honour, it is the way she had the appearance of being his wife.' 'What appearance is that? How do you know that she was not his twin sister?' 'Sure, your honour, he has no twin sister.' 'How do you know? Were you present at his birth?' 'I was not, your honour, but I am sure she is his wife.' 'Well, the responsibility is on your shoulders and we will proceed.'

Though I did not practise before him, I had the honour of being one of the 'children' of Sir Francis Brady, the father of my circuit. As the old Chairmen of the Quarter Sessions were transferred to the new Courts they were allowed to continue their practice at the Bar, and Sir Francis had been appointed as Crown Prosecutor of Cork while he was still holding the position of County Court judge in North Tyrone which was off my circuit. I can imagine what the cases would be like in his court. He was a charming old gentleman, but there was a protégé of 'Pether,' otherwise Lord O'Brien, the Chief Justice, waiting for Sir Francis's job, but Sir Francis just at about the age of eighty-five or eighty-six took a new lease of life and a new wife, and for about twelve or thirteen years more he was kept in decorative order and repair. He was a great musician and used to whistle extremely well selections from the classic works and operas while he was conducting a prosecution. He was so intent on whistling them correctly that he did not always pay close attention to what was going on in Court, and Henry Wright, the Crown Solicitor, would give him a nudge during the trial and he would break off in the middle of a bar to discover that it was necessary for him to examine a witness. He would rise, turn over his brief, and say, 'Your name is John Flaherty?' 'It is not, sir.' 'And you are a painter?' 'I am not, sir.' 'And you live at 19, Donovan's Quay?' 'I have never heard of the place, sir.' 'Henry, what is this man saying?' Henry would screw in his

monocle and say, 'He appears to be contradicting you, sir.' Then he would start again, 'Your name is John Flaherty?' 'It is not, sir.' 'And you are a painter?' 'I have never had a painter in my family. I drive a car.' 'I must ask your Lordship's permission to cross-examine this witness.' His Lordship would observe that this gentleman when sworn had said that his name was Peter Riley. Then Sir Francis would say, 'Oh, I have turned over two pages, my lord.'

Criminals, of course, had to be tried by jury and at the Quarter Sessions, and in some Courts it was absolutely unheard of that any criminal was convicted by these juries, because whatever the evidence might be, a Limerick Court would acquit anybody. In acquitting a man of stabbing in spite of the evidence, on one occasion, the judge, Adams, stood up, and pointing to the jury on his left said: 'These twelve gentlemen on my left say you are not guilty, so I have to discharge you, and I would invite you, Michael, to take a good look at them so that you will know them afterwards, because I will promise you this: if you treat any one of them as you have treated the prosecutor in this case, you will not receive one day's imprisonment from me even if you are convicted of it.'

I was present at a trial in Kerry when there were two ladies put into the dock charged with stealing the wallet of a cattle dealer, and it was an extremely hot day, and one member of the jury was a very stout red-faced gentleman, and as I looked at him this round red face of his began to set, like the sun before a storm; it went down slowly and gradually behind the edge of the jury box. Apparently he found comfortable quarters under the jurors' bench. As no more was seen of him the other eleven went out and acquitted the prisoners as usual. Right in the middle of the next case the sun rose again, and this worthy pushed up his face and sat on the knees of two gentlemen behind him, and the puzzled expression on his face was delightful. He could not co-ordinate what he heard with the evidence he had been listening to before he went to sleep, and it did not strike him that it was a different case. Then he took his hat and shook it violently at the judge. 'My Lord, I want to speak.' 'Be quiet.' 'But I have not spoken yet.' 'Well, what do you want to say?' 'My Lord, I want to let the girls go and give the boy back his money.' The judge could not make out what he was talking about, and when eventually he appealed to the Clerk of the Crown, he had also been asleep, and he thought it was a wise and excellent suggestion. He did not at first see what the trouble was about, but the prisoners

were fetched back and the word 'not' was struck out of the sentence and the girls were imprisoned. Then they proceeded with the next case.

Going to sleep in the jury box I can quite understand, because the first big case I had when I took silk was a celebrated slander action between the Honorable Alexis Roche and Sir Timothy O'Brien. It was a slander published in the hunting field. I was led on that occasion by Redmond Barry, who afterwards was Attorney-General and Lord Chancellor of Ireland—a most eloquent and interesting man. After ten minutes of his speech, he was interrupted by snores from the jury box. The jurors were shaken into a state of wakefulness, and Redmond started his eloquence again. In about a quarter of an hour there were more snores from the jury box. This was the juror who had shaken the first man up, and thought it was now his turn to have a nap.

Litigants were of all sorts. The principal matter about which they litigated was land; you will appreciate that rights in land were mainly concerned with marriage bargains. There was more litigation about marriage than anything except land. Even cows and horses could not compete with marriage. You see marriage was arranged by the parents on each side, and the efforts that each made to get the better of the other side were praiseworthy in the extreme, and when they came into Court afterwards were supported by testimony which, if it could only have been believed, would have been extremely convincing. But marriage led to all sorts of trickery, especially if promissory notes had been given for the girl's fortune. The amount of roguery which would take place to give a promissory note on the occasion of marriage was something wonderful.

The criminal jurisdiction of the country was exercised under a system which was well in advance of the system prevailing in this country. In Scotland matters were much the same as in Ireland. In this long-suffering country of England, a man who has been the victim of a crime (perhaps he has been robbed or his clerk has embezzled) is exposed to be the victim of a very vicious system of procedure. For it is not enough that he should suffer the loss of that of which he has been robbed, but in this country he has to suffer the risk of instituting legal proceedings to punish the thief. The vindication of public law and public action is put upon the shoulders of the private citizen who has already suffered, with the result that having done his duty, if for any reason he fails in the prosecution, he may be exposed to an action by a man, who is probably a pauper, for malicious

prosecution, or perhaps even false imprisonment. How this country has tolerated this iniquitous system for so long I do not know. It was dispensed with in Scotland two hundred years ago, and it never prevailed in Ireland. In Ireland if you were robbed you told the policeman and that was your sole responsibility, and so long as you made an honest statement to the police officer no action could be brought against you. It was a splendid system, by which every stage in the proceedings for the vindication of public justice was done by an officer of the State and at the expense of the State, and all that the citizen was asked to do was to inform the officer of the commission of the crime. How people stand any other system I do not know. There is at present, if I may relate my personal experience, a great deal of agitation and inquiry going on as to how far police officers might be allowed to inquire of persons as to the evidence they can give as to the commission of a crime. Well, the peace-loving English citizen appears to be generally quite willing to tell as much as he honestly does know to the police officer; the Irishman shuts up like a clam. He never made any communication to the police officer, and the investigation of a crime in that country was often a very difficult matter owing to the extraordinary tradition which had become a superstition in the country that the ordinary man should not assist the Crown in the prosecution of a crime.

I would call attention to the fact that I suppose it is two hundred years since anybody in England has been prosecuted for misprision of felony, but not many years ago in Ireland there was started a prosecution for misprision of felony, the trouble being to prove first that the felony had been committed. It is a crime for any person to refuse information to the proper authorities that will lead to the conviction of a felon, and I fancy that the law originated in the happy times when Sovereigns were extremely interested in the conviction of felons because the property of a felon went to the king. This system, the inception of which I have sketched to you, continued until the break up of the Bar. If I had time I might have told you something of the independence of the Bar. The Bar Council was no idle collection of the Bar's representatives in Ireland. The independence of the Bar was maintained, and the tradition of the independence of the Bar was such that when the administration of justice was marred, as it was by the introduction forty years ago of the Spoil System by which judicial offices were misappropriated and awarded to politicians for political services, the Bar nevertheless remained true to the tradition to the end. I

have never known of any case in which any man refused a brief for the defence of an unpopular person. The Irish Bar greatly resented that in the troublous times there were sent over to Ireland to appear before military tribunals representatives of the English Bar. Their relations were sometimes strained with the Bench if they thought that the Bench was intruding on the Bar, and on one occasion I was sent as a deputation to represent to the Lords Justices of Appeal that in the opinion of the Bar Council the right of audience of the Bar was the right to be listened to with respect and attention and without unseemly interruption. It was not often that we had to do that, and so things went on until you knew what the end of it was. The division of the country meant the end of the old Irish Bar. There were set up in Ireland two totally different systems of law and administration, and it was to one whose heart and soul were buried in the practice of his profession a great loss and a great misery. The recollection of the old time is very very acute with me, and I hope the recounting of the memories of the past has not been altogether uninteresting to you.

DANGEROUS THINGS AND THE NON-NATURAL USER OF LAND.

W. T. S. Stallybrass.

IT is perhaps true that one of the most important moral qualities of a man, especially an undergraduate, is a knowledge of where to 'draw the line'; it is certainly true that one of the most essential parts of a lawyer's equipment is the capacity for drawing distinctions correctly. The whole framework of the law is based upon distinctions, and the drawing of false distinctions is as disastrous as is the failure to draw those that are based upon sound reasoning. It is the object of this article to consider, very tentatively, two distinctions which have been introduced into the common law relating to injury done to others by the property of the defendant: in the first place, the distinction between those things which are dangerous *per se* and those things which are dangerous *sub modo*, and in the second place, the distinction between the natural and the non-natural user of land. I shall then endeavour to consider the relation of these two problems to each other. But there will be no attempt to state the nature or extent of the liability that arises; for example, I shall not consider the true nature of the rule in *Rylands* v. *Fletcher* or the extent of the duty owed by him who deals with dangerous chattels, though some light may incidentally be thrown upon such matters.

The consideration of the nature of dangerous things arises in several connexions: the liability of the vendor, manufacturer, hirer, consignor or donor of dangerous chattels, the liability of the occupier of land to persons coming upon his land, cases falling under the rule in *Rylands* v. *Fletcher*, liability for public nuisance and under certain statutes. And throughout the reports we shall find a distinction made between things which are, as it is alleged, dangerous in themselves, and other things. The names of two of the greatest exponents of the English common law in all its long history (Baron Parke and Lord Sumner) are in particular associated with this distinction, and it has never been more clearly expressed than

by Lord Sumner, then Hamilton J., in *Blacker* v. *Lake and Elliot*,[1] in discussing the explosion of a defective brazing-lamp:

> 'The lamp was an instrument of a common kind. . . . It was absolutely innocuous until used with paraffin, and when it had been charged with paraffin it worked with perfect safety and without any defect whatever for so long a period as almost a year. . . . We are not dealing here with the case of the sale of any commodity which is, as it is sometimes expressed, dangerous *per se*. This commodity is dangerous only *sub modo*.'

But this way of expressing the distinction was, I believe, used for the first time by Lord Sumner. The commonest expression is 'things dangerous in themselves,'[2] but many other attempts have been made to categorize the things which the judges have had in mind: sometimes it is by the addition of an emphatic adverb, such as 'essentially,'[3] 'peculiarly,'[4] 'extremely'[5] or 'highly,'[6] sometimes by a kind of explanatory qualification such as 'objects in themselves capable of causing injury, if meddled with, and which children are likely to meddle with,'[6] 'a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers,'[7] 'of such a character that, if it be used carelessly, it may injure some third person who is near to it,'[8] or 'dangerous in itself, *i.e.* of a dangerous character as distinguished (as regards a chattel) from a danger only arising from defective manufacture or repair.'[9] It will be noted that this last explanatory qualification differs *toto caelo* from that in the other two passages. Yet a third explanation is suggested by Parke B. in *Langridge* v.

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[1] (1912) 106 L. T. 533, 535, 536. An unusual somnolence seems to have come over the other law reporters about this period: this volume of the *Law Times* contains several interesting cases which are not reported elsewhere.

[2] It would be superfluous to give more than a few examples: *Langridge* v. *Levy* (1837) 2 M. & W. 519 (Parke B.); *Collis* v. *Selden* (1868) L. R. 3 C. P. 495 (Willes J.); *Le Lievre* v. *Gould* [1893] 1 Q. B. 491 (Bowen L.J.); *Earl* v. *Lubbock* [1905] 1 K. B. 253 (Stirling L.J.); *Dominion Natural Gas Co.* v. *Collins* [1909] A. C. 640 (Lord Dunedin); *Latham* v. *Johnson* [1913] 1 K. B. 398 (Farwell and Hamilton L.JJ.); *Quebec Ry. Co.* v. *Vandry* [1920] A. C. 662 (Lord Sumner); *Noble* v. *Harrison* [1926] 2 K. B. 332 (Rowlatt and Wright JJ.); *Anglo-Celtic Shipping Co.* v. *Elliott* (1926) 42 T. L. R. 297 (Roche J.).

[3] *Noble* v. *Harrison, ubi supra* (Wright J.).

[4] *Gautret* v. *Egerton* (1867) L. R. 2 C. P. 371 (Willes J.).

[5] *Piggot* v. *Eastern Counties Ry. Co.* (1846) 3 C. B. 229 (Tindal C.J.).

[6] *Latham* v. *Johnson, ubi supra* (Hamilton L.J. at p. 414); *Jones* v. *Festiniog Ry. Co.* (1868) L. R. 3 Q. B. 733 (Lush J.); *Weld-Blundell* v. *Stephens* [1920] A. C. p. 985 (Lord Sumner).

[7] *Parry* v. *Smith* (1879) 4 C. P. D. 325, 327.

[8] *Le Lievre* v. *Gould, ubi supra*, at p. 502.

[9] *White* v. *Steadman* [1913] 3 K. B. 340, 347 (Lush J.).

Levy,[10] who spoke of a gun as 'not of itself dangerous' because it 'requires an act to be done, that is, to be loaded, in order to make it so.' Perhaps, after all, those judges have been the wisest, if the least heroic, who have spoken simply of 'dangerous things'[11] or 'things of a dangerous character.'[12] Sometimes these *hostes humani generis* have been spoken of as 'noxious'[13] or 'things in themselves offensive,'[14] but such epithets do not really carry us any further.

In the classic judgment of the Exchequer Chamber delivered by Blackburn J. in *Fletcher* v. *Rylands*[15] he used the expression 'anything likely to do mischief if it escapes,' which should be qualified in reading his judgment by the addition of the words 'though harmless whilst it remains upon his land.' Subsequent decisions have equated this expression with 'dangerous things.' Darling J. has pointed out[16] that, though the expression 'dangerous in itself' appears in the headnote of *Rylands* v. *Fletcher* in the House of Lords,[17] it does not occur in the judgments. But Blackburn J. has himself explained the rule as applying to a 'thing of a dangerous nature,'[18] and it has been since so treated by the highest authorities.[19] On the other hand, in some cases, stress has been laid upon the escape,[20] in some upon the likelihood of mischief in the event of such escape,[21] in others upon the tendency to escape.[22] Some eminent

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[10] *Langridge* v. *Levy*, *ubi supra*. With this contrast Lord Dunedin in delivering the judgment of the Judicial Committee of the Privy Council in *Dominion Natural Gas Co.* v. *Collins*, *ubi supra* (at p. 646): 'A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it.'

[11] *E.g.* Erle C.J. in *Potter* v. *Faulkner* (1861) 1 B. & S. 800; Bramwell L.J. in *Powell* v. *Fall* (1880) 5 Q. B. D. 597; Collins M.R. in *Earl* v. *Lubbock* [1905] 1 K. B. 253.

[12] Mellor J. in *Powell* v *Fall*, *ubi supra*.

[13] *Hurdman* v. *N. E. Ry. Co.* (1878) 3 C. P. D. 168 (Cotton L.J.); *Caledonian Ry. Co.* v. *Mulholland* [1898] A. C. 216 (Lord Shand); *Ruoff* v. *Long & Co.* [1916] 1 K. B. 148 (Avory J.).

[14] *Hurdman* v. *N. E. Ry. Co.*, *ubi supra*.

[15] (1866) L. R. 1 Ex. 265, p. 279. Cp. Lord Ellenborough in a very early case, *Dixon* v. *Bell* (1816) Holt, 233, 'an instrument of mischief,' and on the motion for a new trial, 5 M. & S. 198, 'capable of doing mischief.'

[16] *Chichester Corporation* v. *Foster* [1906] 1 K. B. 167.

[17] (1868) L. R. 3 H. L. 330.

[18] *Jones* v. *Festiniog Ry. Co.* (1868) *ubi supra*.

[19] *E.g.* by Bowen L.J. in *Filburn* v. *People's Palace and Aquarium Co.* (1890) 25 Q. B. D. 258.

[20] *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K. B. 772 (Lord Sumner); *Mansel* v. *Webb* (1918) 88 L. J. K. B. 323 (Duke L.J.); *Manton* v. *Brocklebank* [1923] 2 K. B. 212 (Atkin L.J.).

[21] *Ponting* v. *Noakes* [1894] 2 Q. B. 281 (Charles J.); *Greenwell* v. *Low Beechburn Colliery Co.* [1897] 2 Q. B. 165 (Bruce J.); *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14 (Lord Alverstone C.J.); *Baker* v. *Snell* [1908] 2 K. B. 825 (Kennedy L.J.).

[22] *Farrant* v. *Barnes* (1862) 11 C. B. (N.S.) 553 (Willes J.); *Wilson* v. *New-*

judges have regarded cases falling under the rule in *Rylands* v. *Fletcher* as cases of trespass,[23] and this seems to be based upon the tendency of the thing in question to escape. Thus Bramwell B. in *Carstairs* v. *Taylor*[24] put it in this way: 'The defendant conducted the water to the place where it escaped. He may therefore be said, in a sense, to have poured the water on to the plaintiffs' premises, which is more accurate than to say that the water escaped, or to use any other expression which speaks of the water as though it were an active agent.' The same judge in his dissenting judgment in *Fletcher* v. *Rylands* in the Court of Exchequer, which was upheld in the higher Courts, regarded that action as a case of trespass.[25]

This diversity of phraseology leads us naturally to attempt to discover inductively from an examination of the things which have been in fact held to impose the special liabilities attaching to dangerous things what are the essential characteristics of 'dangerousness.' It will be safest to consider the cases fully under the different rules separately. The following chattels have been held dangerous so as to impose a duty towards third persons independently of contractual liability or fraud: gas,[26] tins of chlorinated lime known by the vendor to explode unless carefully opened,[27] poison,[28] a negligently compounded hair-wash,[29] a loaded gun,[30] 'pluperfect liquid,' a secret preparation which

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berry (1871) L. R. 7 Q. B. 31 (Mellor J.). Cp. 'extremely dangerous and unruly character': *Piggot* v. *Eastern Counties Ry. Co.* (1846) 3 C. B. 229 (Tindal C.J.). With these statements of the law should be contrasted *Firth* v. *Bowling Iron Co* (1878) 3 C. P. D. 254 and the judgment of Bramwell B. in *Nichols* v. *Marsland* (1875) L. R. 10 Ex. 255.

[23] Stirling L.J. in *Foster* v. *Warblington U. C.* [1906] 1 K. B. 648; Parker J. in *Jones* v. *Llanrwst U. C.* [1911] 1 Ch. 393; Astbury J. in *Hoare & Co.* v. *McAlpine* [1923] 1 Ch. 167, 175 (referring to argument for plaintiffs): 'an action on the case in the nature of trespass . . . where a man releases some force brought by him on to his own property, which gets beyond his control and injures his neighbour.' Cp. the language of Blackburn J. in *Hodgkinson* v. *Ennor* (1863) 4 B. & S. 229.

[24] (1871) L. R. 6 Ex. 217, 221. Cp. the same judge in *Nichols* v. *Marsland*, *ubi supra*.

[25] (1865) 3 H. & C. 774, 789.

[26] *Parry* v. *Smith*, *ubi supra*; *Dominion Natural Gas Co.* v. *Collins*, *ubi supra*.

[27] *Clarke* v. *Army and Navy Co-operative Society* [1903] 1 K. B. 155.

[28] *Thomas* v. *Winchester* (1852) 6 N. Y. 397, Bigelow L.C. 602; cp. *per* Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins*, *ubi supra*.

[29] *George* v. *Skivington* (1869) L. R. 5 Ex. 1, as explained by Brett M.R. in *Cunnington* v. *G. N. Ry. Co.* (1883) 49 L. T. 392, Field and Cave JJ. in *Heaven* v. *Pender* (1882) 9 Q. B. D. 302; Chitty J. in *Cann* v. *Wilson* (1888) 39 Ch. D. 39; Romer J. in *Scholes* v. *Brook* [1891] W. N. 16, and (*semble*) Lord Atkinson in *Cavalier* v. *Pope* [1906] A. C. 428. Lush J. also thought that the decision could be justified if it had proceeded on that ground: *Blacker* v. *Lake and Elliot* (1912) 106 L. T. 533; *White* v. *Steadman* [1913] 3 K. B. 340.

[30] *Dixon* v. *Bell* (1816) 1 Stark. 287; Holt 233; on appeal 5 M. & S. 198. *Sullivan* v. *Creed* [1904] 2 Ir. R. 317. Cp. *per* Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins*, *ubi supra*.

gave off hydrogen if it was in contact with cast iron and made an explosive mixture in contact with the air,[31] and a horse known to shy.[32] And it may be inferred from decided cases that a crane,[33] a scaffold with a defective put-log,[34] a railway waggon or carriage,[35] a van,[36] a ginger-beer bottle,[37] and a lamp,[38] if known to be defective, fall in the same category. But in none of these latter cases was the special duty imposed in the absence of knowledge of the defect, because they were not things 'dangerous in themselves.' '*A* bottle of ginger beer is not in itself a dangerous thing,' but *the* bottle with the defect was.[38a]

Unloaded guns have been spoken of alike as dangerous and as not dangerous in themselves. Parke B., as we have seen, regarded an unloaded gun as not of itself dangerous, because it requires an act to be done, that is, to be loaded, in order to make it so.[39] But Fitzgibbon L.J. regarded all guns, loaded or unloaded, as dangerous: 'How often,' he said, 'have we heard young people warned, even about unloaded guns—"Charged, or not charged, she's dangerous," "Don't point that gun; the devil might load it unbeknownst" are proverbial Irish cautions, but they are none the less prudent counsel.'[40]

One thing in English common law can never be dangerous. Written documents, such as certificates, valuations, prospectuses, though they contain negligent mis-statements and thereby cause serious loss to those who act upon them never impose liability (apart from statute) upon those who put them in circulation in the absence of a contractual nexus or fraud.[41] They are not dangerous things.[42]

The whole of this branch of the law has been affected by the determination of the judges not to allow a breach of contract between A and B to give a right of action *as such* to C. The

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[31] *Anglo-Celtic Shipping Co.* v. *Elliott* (1926) 42 T. L. R. 297.

[32] *White* v. *Steadman* [1913] 3 K. B. 340. Cp. *Le Lievre* v. *Gould*, *ubi supra*, *per* Bowen L.J.

[33] *Blakemore* v. *Bristol and Exeter Ry. Co.* (1858) 8 E. & B. 1035.

[34] *MacCarthy* v. *Young* (1861) 6 H. & N. 329.

[35] *Caledonian Ry. Co.* v. *Mulholland*, *ubi supra*; *Redhead* v. *M. Ry. Co.* (1869) 9 B. & S. 519.

[36] *Earl* v. *Lubbock*, *ubi supra*.

[37] *Bates* v. *Batey* [1913] 3 K. B. 351.

[38] *Longmeid* v. *Holliday* (1851) 6 Ex. 761.

[38a] *Bates* v. *Batey* [1913] 3 K. B. 351, 353.

[39] *Langridge* v. *Levy* (1837) 2 M. & W. 519.

[40] *Sullivan* v. *Creed* [1904] 2 Ir. R. 317, 340. Cp. n. (10) *supra*.

[41] *Le Lievre* v. *Gould* [1893] 1 Q. B. 491; *Australian Steam Shipping Co.* v. *Devitt* (1917) 33 T. L. R. 178; *Humphery* v. *Bowers* (1929) 45 T. L. R. 297.

[42] *Le Lievre* v. *Gould*, *ubi supra*. This rule would seem to be an anomaly which can only be explained by the history of our law. It is an unforeseen development of the common law principle that damages could never be obtained for an innocent misrepresentation except in contract. See also Bigelow, Leading Cases on the Law of Torts, pp. 619—626.

liability must rest upon a breach of duty owed to the plaintiff; it must not rest upon the negligent performance of contractual duties owed to third persons. The special liabilities attaching to dangerous things are liabilities in tort, not contract. The desire not to impair this well-settled principle of law has, I think, had its influence upon the course of the decisions.[43]

Nor is a letter containing a libel a dangerous thing. The analogy to an explosive is a false one. 'The letter,' said Lord Sumner in *Weld-Blundell* v. *Stephens*,[44] 'could not "go off" of itself. If let alone, it was quite harmless.'

When we turn to the acts or omissions causing public danger which make a defendant indictable for a public nuisance we find that gunpowder mills,[45] 4,000 gallons of wood-naphtha,[46] and jute set out to dry[47] have all been regarded as so dangerous that the keeping of them in an unsuitable place is indictable, whilst a *dictum* puts in the same category fireworks.[48] Statutes have specially dealt with mineral oils, fireworks and explosives.[49]

The following articles have been held to impose a special duty on those who deliver them to carriers: sulphuric acid,[50] bleaching-powder,[51] nitric acid,[52] oxygenated water or perhydrol,[53] salt-cake,[54] roghan (an oil or varnish, composed of gum-gopal and linseed oil, of a very inflammable nature),[55] and goods shipped upon an illegal voyage, which might involve the ship in danger of forfeiture or delay.[56] A railway private Act has provided for vitriol or other goods of dangerous quality,[57] and Crompton J. in a famous judgment suggested that hay or cotton, apparently in a fit state, but really in a dangerous state from a tendency to heat, or a new article of commerce known

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[43] *E.g. Langridge* v. *Levy* (1837) 2 Ex. 519; *Winterbottom* v. *Wright* (1842) 10 M. & W. 109; *Heaven* v. *Pender* (1883) 11 Q. B. D. 503; *Earl* v. *Lubbock* [1905] 1 K. B. 253; *Caledonian Ry. Co.* v. *Mulholland* [1898] A. C. 216. See Bohlen's Studies in the Law of Torts, pp. 76—80, 86—7, and for the difficulties of the law the judgment of Kennedy J. in *Earl* v. *Lubbock* (1904) 74 L. J. K. B. 121.

[44] [1920] A. C. 956, 985.

[45] *Crowder* v. *Tinkler* (1816) 19 Ves. 617.

[46] *R.* v. *Lister* (1857) 7 Cox, 342.

[47] *Hepburn* v. *Lordan* (1865) 2 H. & M. 345.

[48] *Per* Lord Campbell in *R.* v. *Lister, ubi supra.*

[49] See 2 Russell on Crimes, 8th ed., 1715. See *R.* v. *Bennett* (1858) 8 Cox, 74; *Webley* v. *Woolley* (1871) L. R. 7 Q. B. 61.

[50] *Alston* v. *Herring* (1856) 11 Ex. 822.

[51] *Brass* v. *Maitland* (1856) 6 E. & B. 471.

[52] *Farrant* v. *Barnes* (1862) 11 C. B. (N.S.) 553.

[53] But not oxygen water which gives off only 20 volumes of oxygen instead of 100: *Great Northern Ry. Co.* v. *L. E. P. Transport and Depository, Ltd.* [1922] 2 K. B. 742.

[54] *Hutchinson* v. *Guion* (1858) 5 C. B. (N.S.) 149.

[55] *Williams* v. *East India Co.* (1802) 3 East, 192.

[56] *Mitchell, Cotts & Co.* v. *Steel Bros.* [1916] 2 K. B. 610 (Atkin J.).

[57] *Hearne* v. *Garton* (1859) 2 E. & E. 66.

by the consignor to be dangerous would impose the same liabilities.[58] On the other hand it has been held by McCardie J. that barley containing a quantity of sand and stones, by reason of which a pneumatic suction pump became choked in discharging it and the ship was delayed, was not a dangerous thing and the rule as to dangerous things did not apply.[59]

In dealing with the liability of occupiers the Courts have held that belladonna plants,[60] yew-trees,[61] an unprotected railway turn-table[62] or wheel of a haulage system,[63] staging with a defective rope,[64] a bottle containing a stick of phosphorus,[65] and heaps of lime[66] are dangerous things. So also a chandelier known to be negligently hung.[67] On the other hand, a heap of paving stones in broad daylight in a private close cannot impose the same liability.[68]

Finally we will examine those cases in which things have been held to fall or not to fall within the rule in *Rylands* v. *Fletcher*.[69] *Rylands* v. *Fletcher* itself was a case in which water accumulated in a reservoir escaped, and it is natural therefore that water should generally have been regarded as within the rule.[70] Yet Stephen J. did not apparently regard water collected in a cistern as falling within the principle at all.[71] Fire[72] and things likely to cause a fire, *e.g.* gas,[73] drums of benzol,[74] motor-cars with tanks full of petrol,[75] railway engines[76]

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[58] *Farrant* v. *Barnes*, *ubi supra*.

[59] *Transoceanica Societa Italiana* v. *Shipton* [1923] 1 K. B. 31, distinguishing *Mitchell, Cotts & Co.* v. *Steel Bros.*, *ubi supra*.

[60] *Glasgow Corpn.* v. *Taylor* [1922] 1 A. C. 44.

[61] *Ponting* v. *Noakes* [1894] 2 Q. B. 281. *Per* Collins J. at p. 291.

[62] *Cooke* v. *Midland G. W. Ry. of Ireland* [1909] A. C. 229.

[63] *Addie and Sons* v. *Dumbreck* (1929) 45 T. L. R. 267, at pp. 268, 270, 272.

[64] *Heaven* v. *Pender* (1883) 11 Q. B. D. 503.

[65] *Williams* v. *Eady* (1893) 10 T. L. R. 41.

[66] Cp. *per* Hamilton L.J. in *Latham* v. *R. Johnson & Nephew* [1913] 1 K. B. 398.

[67] *Collis* v. *Selden* (1868) L. R. 3 C. P. 495.

[68] *Latham* v. *R. Johnson & Nephew*, *ubi supra*.

[69] (1868) L. R. 3 H. L. 330.

[70] *E.g. Carstairs* v. *Taylor* (1871) L. R. 6 Ex. 217; *Crompton* v. *Lea* (1874) 19 Eq. 115; *Dixon* v. *Metropolitan Board of Works* (1881) 7 Q. B. D. 418; *Whitmores (Edenbridge), Ltd.* v. *Stanford* [1909] 1 Ch. 427, where Eve J. spoke of 'Water, or any other dangerous element'; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K. B. 772.

[71] *Blake* v. *Land and House Property Corporation* (1887) 3 T. L. R. 667.

[72] *De Silva* v. *Korossa (Ceylon) Rubber Co.* (1919) 88 L. J. P. C. 54; *Job Edwards* v. *Birmingham Canal Navigations* [1924] 1 K. B. 341, *per* Scrutton L.J.

[73] *Batcheller* v. *Tunbridge Wells Gas Co.* (1901) 84 L. T. 765.

[74] *Jefferson* v. *Derbyshire Farmers* [1921] 2 K. B. 281, 290 (Atkin L.J.).

[75] *Musgrove* v. *Pandelis* [1919] 2 K. B. 43.

[76] *Piggot* v. *Eastern Counties Ry. Co.* (1846) 3 C. B. 229; *Jones* v. *Festiniog Ry. Co.* (1868) L. R. 3 Q. B. 733. Contrast *Vaughan* v. *Taff Vale Ry. Co.* (1860) 5 H. & N. 679.

or traction-engines emitting sparks[77] have without difficulty been brought into the same category. So also with explosives,[78] even although not known to be explosives at the time.[79] Electricity, quite apart from its incendiary possibilities, is a dangerous thing,[80] and chemicals that cause damage to property by escaping, *e.g.* gas-oil,[81] or by giving off fumes,[82] also impose liability under the rule. The rule itself was founded in part upon a consideration of the law relating to the escape of filth; it is inevitable therefore that we should find that it applies to the escape of sewage.[83] It is not surprising that it has been held to cover an artificially accumulated slag-heap,[84] and even a lamp overhanging the highway.[85] But it needed a bigger feat of judicial imagination to bring within the principle decayed wire-rope[86] and vibrations.[87] Trees have caused considerable difficulty. Yew-trees that trespass are obviously dangerous,[88] but elm-trees and other trees normally innocuous do not so clearly fall within the same principle. But it has been held[89] that the same principle applies. And yet it has been said more recently[90] that trees such as beeches, unlike trees with poisonous fruit or foliage, are not within the rule.

Strangely enough in this connexion loaded guns do not seem to be regarded as inherently dangerous. Blackburn J. said *obiter*[91]:

> 'If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably

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[77] *Powell* v. *Fall* (1880) 5 Q. B. D. 597; *Mansel* v. *Webb* (1918) 88 L. J. K. B. 323.

[78] *Miles* v. *Forest Rock Granite Co.* (1918) 34 T. L. R. 500.

[79] D.N.P. (di-nitro-phenol): *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* [1920] 2 K. B. 487; [1921] 2 A. C. 465.

[80] *National Telephone Co.* v. *Baker* [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways* [1902] A. C. 381; cp. *Quebec Ry. Co.* v. *Vandry* [1920] A. C. 662.

[81] *Smith* v. *Great Western Ry. Co.* (1926) 135 L. T. 112.

[82] *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14.

[83] *Humphries* v. *Cousins* (1877) 2 C. P. D. 239; *Foster* v. *Warblington U. C.* [1906] 1 K. B. 648; *Jones* v. *Llanrwst U. C.*, *ubi supra*.

[84] *Att.-Gen.* v. *Cory Bros.* [1921] 1 A. C. 521. But apparently not rocks in imminent danger of falling: *Pontardawe R. D. C.* v. *Moore-Gwyn* (1929) 45 T. L. R. 276.

[85] *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314.

[86] *Firth* v. *Bowling Iron Co.* (1878) 3 C. P. D. 254.

[87] *Hoare & Co.* v. *McAlpine* [1923] 1 Ch. 167.

[88] *Wilson* v. *Newberry* (1871) L. R. 7 Q. B. 31; *Crowhurst* v. *Amersham Burial Board* (1878) 4 Ex. D. 5.

[89] *Smith* v. *Giddy* [1904] 2 K. B. 448. Cp. *Cheater* v. *Cater* [1918] 1 K. B. 247, *per* Bankes L.J.

[90] *Noble* v. *Harrison* [1926] 2 K. B. 332.

[91] *Smith* v. *L. & S. W. Ry. Co.* (1870) L. R. 6 C. P. 14, 22.

anticipate that any one will be, he is not liable to any one whom he shoots,'

and in *Stanley* v. *Powell*[92] it was not suggested that any special liability was imposed upon the defendant because the gun with which he had shot the plaintiff was a dangerous thing.

Mechanically-propelled vehicles have caused no less difficulty than trees. A perusal of the daily papers has certainly led a large number of, no doubt weak-minded, persons to regard motor vehicles as distinctly likely to cause damage if they escape and as not unlikely to escape.[93] And Darling J. has taken the same view as regards a motor-car with a defective steering-wheel.[94] But this is apparently wrong. A motor-car with petrol in its tank is a dangerous thing in its garage,[95] but it loses its dangerous quality once it gets into motion, even if it have a defective axle so as to be uncontrollable.[96] And motor-buses are safe[97] even in the view of Darling J.[98] So also are unattended steam-lorries, even though not in motion,[99] and exceptionally heavy traction engines,[100] but not a steam-roller so heavy as frequently to injure gas-pipes properly laid below the surface of streets.[1]

Historically the rule relating to the liability for animals *ferae naturae* or known to be dangerous has a different provenance from the rule in *Rylands* v. *Fletcher*, but now the two rules are treated by a preponderance of authority as being one.[2] And cattle-trespass, one of the foundations of the rule,

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[92] [1891] 1 Q. B. 86. But this case has been criticized, *e.g.* by Beven (Negligence, 4th ed. i. 710-2), and Charlesworth (Liability for Dangerous Things, p. 178).

[93] Cp. O'Connor L.J. in 38 L. Q. R. p. 22.

[94] *Hutchins* v. *Maunder* (1920) 37 T. L. R. 72.

[95] *Musgrove* v. *Pandelis*, *ubi supra*.

[96] *Phillips* v. *Britannia Hygienic Laundry Co.* [1923] 1 K. B. 539; [1923] 2 K. B. 832.

[97] *Wing* v. *L. G. O. C.* [1909] 2 K. B. 652.

[98] *Parker* v. *L. G. O. C.* (1909) 25 T. L. R. 429; 26 T. L. R. 18.

[99] *Ruoff* v. *Long & Co.* [1916] 1 K. B. 148.

[100] *Chichester Corporation* v. *Foster* [1906] 1 K. B. 167.

[1] *Gas Light and Coke Co.* v. *St. Mary Abbots'* (1885) 15 Q. B. D. 1, approved in *Chichester Corporation* v. *Foster*, *ubi supra*.

[2] *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 A. C. 127 (Lord Halsbury); *Filburn* v. *The People's Palace and Aquarium Co.* (1890) 25 Q. B. D. 258 (Bowen L.J.); *Batcheller* v. *Tunbridge Wells Gas Co.* (1901) 84 L. T. 765 (Farwell J.); *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14 (Lord Alverstone C.J.); *Baker* v. *Snell* [1908] 2 K. B. 825 (Kennedy L.J.); *Lowery* v. *Walker* [1909] 2 K. B. 433 (Pickford J.); *White* v. *Steadman* [1913] 3 K. B. 340 (Lush J.); *Miles* v. *Forest Rock Granite Co.* (1918) 34 T. L. R. 500 (Swinfen Eady M.R.); *Manton* v. *Brocklebank* [1923] 2 K. B. 212 (Lord Sterndale, Warrington and Atkin L.JJ.); *Hines* v. *Tousley* (1926) 95 L. J. K. B. 773 (Bankes L.J.); *Noble* v. *Harrison* [1926] 2 K. B. 332 (Wright J.). Cp. *Vaughan* v. *Taff Vale Ry. Co.* (1860) 5 H. & N. 679 (Cockburn C.J., Crompton J.). *Contra*, *Nichols* v. *Marsland* (1875) L. R. 10 Ex. 255 (Bramwell B.). It is unnecessary here to consider when liability has been imposed or

has been treated as an illustration of it.[3] One judge, Kay J., has boldly stated that the principle applies to everything: 'Anyone who collects upon his own land water, *or anything else*, which would not in the natural condition of the land be collected there, ought to keep it in at his peril.'[4] But this bold and frank admission stands, it seems, alone. And certain things have been held not to fall within the rule: domestic animals, such as horses,[5] sheep,[6] and dogs,[7] infected persons discharged from hospital prematurely,[8] retaining walls,[9] and an area protected by railings.[10]

This long, dull catalogue is ended, and we are now in a position to ask ourselves whether we can by the process of induction arrive at any valid conception of a dangerous thing. It is apparent that chemicals inspire fear in the breasts of our judges: *omne ignotum pro terrifico*. The knowledge of chemicals, even amongst experts, is constantly growing and varying.[11] He who plays with chemicals acts at his peril. 'D.N.P. is much less dangerous than many other accompaniments of ordinary manufacture—for example, dust in a flour mill,'[12] but he that stores D.N.P. is regarded as storing a dangerous explosive.[13] Upon chemicals unanimity prevails. And fire and electricity have failed yet to find their champions on the Bench. But there unanimity seems to cease. Water and trees, stacks of chimneys, motor-cars and unloaded guns, are sometimes regarded as dangerous in themselves and sometimes not.

Dr. Charlesworth in his suggestive book on 'Liability for Dangerous Things' found that there were certain characteristics common to all dangerous things, which are not present in any

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redress denied on account of the nature of the different animals. See Salmond's Torts (7th ed.), § 127.

[3] *Holgate* v. *Bleazard* [1917] 1 K. B. 443.

[4] *Snow* v. *Whitehead* (1884) 27 Ch. D. 588, 591.

[5] *Manton* v. *Brocklebank* [1923] 2 K. B. 212.

[6] *Heath's Garage* v. *Hodges* [1916] 2 K. B. 370.

[7] *Hines* v. *Tousley* (1926) 95 L. J. K. B. 773.

[8] *Evans* v. *Liverpool Corporation* [1906] 1 K. B. 160. Yet knowingly to expose in a public highway a person infected with a contagious disease injuriously to others is an indictable nuisance: *R.* v. *Vantandillo* (1815) 4 M. & S. 73.

[9] *Ilford U. C.* v. *Beal* [1925] 1 K. B. 671; *St. Anne's Well Brewery Co.* v. *Roberts* (1928) 140 L. T. 1.

[10] *Barker* v. *Herbert* [1911] 2 K. B. 633.

[11] *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14, *per* Farwell L.J.

[12] Younger L.J. in *Belvedere Fish Guano Co.* v. *Rainham Chemical Works* [1920] 2 K. B. 487, 515.

[13] *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* [1921] 2 A. C. 465.

other things. 'To constitute anything a dangerous thing,' he says, 'its power to cause damage must be—

(i) Inherent,

(ii) Invariable, and

(iii) Due to human agency.' [14]

But 'danger is relative.' The words are Lord Sumner's.[15] Brandy and wine may be kept in the cellars of town houses, though ignitable substances, and gunpowder may be kept in uninhabited places, but if it be kept in large quantities in closely inhabited places it is an indictable nuisance.[16] This was very clearly put by Gibson J. in *Sullivan* v. *Creed* [17]:

> 'The question of liability depends on the particular circumstances, including the nature of the dangerous article, the place, the persons likely to be brought in contact with it, and the time. A hatchet, a bottle of poison labelled "poison," the same bottle unlabelled, a loaded gun, gunpowder, or dynamite, all represent articles of varying degrees of danger, and the greater the danger the higher is the standard of the diligence which the law exacts. Where the article is known, according to common experience, to exercise an allurement, temptation, or fascination even—particularly over young persons—to meddle with it, the utmost care ought to be taken. Firearms and fireworks would come within this category. So as to place: a loaded gun left on a highway or school playground, or in the hall of a house open to young children, would be dangerous in a way that the same weapon would not be if it was forgotten on a mountain, or was left in a shooting-lodge tenanted by sportsmen. The same considerations apply to the persons likely to be thrown in the way of the dangerous article, and also to the time when the occurrence takes place. Young persons are more likely to be imprudent than those of mature years; and it would be more dangerous to leave perilous articles about in the daytime than at night.'

It is submitted that the essence of the matter lies in the relativity of danger. Is there anything which is at all times and in all places and in all circumstances dangerous? Even yellow phosphorus is, it seems, for legal purposes not dangerous if locked up.[18] There are, no doubt, certain chemicals of such

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[14] P. 7.

[15] *Latham* v. *Johnson* [1913] 1 K. B. 398.

[16] *R.* v. *Lister* (1857) 7 Cox, 342. Cp. *Crowder* v. *Tinkler* (1816) 19 Ves. 617; *Hepburn* v. *Lordan* (1865) 2 H. & M. 345; *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* [1921] 2 A. C. 465. And under statute, see *Bliss* v. *Lilley* (1862) 3 B. & S. 128.

[17] [1904] 2 Ir. R. 317, 325—326.

[18] *Williams* v. *Eady* (1893) 10 T. L. R. 41.

a highly ignitable or explosive character that they cannot be regarded as safe anywhere except in a cave at the top of Mount Everest. But such things are extremely few in number and juridically unimportant. For practical purposes the more closely we examine the question the more assuredly are we forced into agreement with Darling J., who said [19]:

> "I very much doubt whether anything whatever can, strictly speaking, be called "a dangerous thing." That depends on its use—on environment. Water . . . is only dangerous under certain conditions, and so is fire.[20] The expression "in itself dangerous" is used in the headnote to *Rylands* v. *Fletcher*, but I do not find it in the judgments; nor do I think it an appropriate expression anywhere, except, perhaps, as used by Mr. Pope in regard to "a little learning."[21]

And just as there is nothing which is at all times and in all circumstances dangerous so it seems that there is scarcely anything which is in all circumstances safe—a conclusion at which we may infer that Kay J. had arrived when he stated that the rule in *Rylands* v. *Fletcher* applied to anything.[22]

If we accept this conclusion, it seems undesirable that it should be a matter of law for the Court to determine whether a thing is a thing in itself dangerous with a view to seeing whether any special rule of law is applicable to it, as was laid down by Hamilton J. in his well-known judgment in *Blacker* v. *Lake and Elliot, Ltd.*[23]

The principle of law behind all these cases is, it is submitted, that if a man takes a risk, which he ought not to take without also taking upon his own shoulders the consequences of that risk, he shall pay for any damage that ensues.[24]

In every case the question really is: Was the risk one which the defendant was entitled to take only on condition of paying compensation to those injured thereby irrespective of any

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19 *Chichester Corporation* v. *Foster* [1906] 1 K. B. 167, 177—178.

20 Cp. *Musgrove* v. *Pandelis*, *ubi supra*.

21 Darling J.'s predilection for citations from English poetry, which once earned him a judicial rebuke ([1925] 2 K. B. p. 636), seems to have here led him into an unnecessary qualification. Even 'a little learning' is not at all times and in all circumstances as dangerous as complete ignorance.

22 *Supra*, p. 385.

23 (1912) 106 L. T. 533.

24 Even if the damage results indirectly: *Dixon* v. *Metropolitan Board of Works* (1881) 7 Q. B. D. 418; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K. B. 772 (Bray J.); *Att.-Gen.* v. *Cory Bros.* [1921] 1 A. C. 521 (Lord Finlay). But the damage must not be too remote: *Cattle* v. *Stockton Ironworks Co.* (1875) L. R. 10 Q. B. 453, and presumably must be the direct consequence of the defendant's act within the rule in *Re Polemis* [1921] 3 K. B. 560.

negligence on his part? And the answer to that question will not depend upon whether the thing in question was dangerous *per se*, but upon whether it was dangerous in the circumstances of the particular case.[25] And in determining whether a risk was being taken which should impose liability the knowledge of the defendant that he was taking a risk will be material.[26] But in certain cases that knowledge will be presumed, as if a man stores chemicals[27] or introduces fire on to the highway.[28] By a parity of reasoning it would seem that a man should be regarded as taking the risk, not only if he knows of the danger which is being run, but if by the exercise of reasonable care he ought to have known of it. And there is considerable authority for saying that in these cases constructive knowledge is equivalent to knowledge.[29] But Horridge J. in *Bates* v. *Batey*[30]

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[25] There are many judgments in which no distinction has been taken between things dangerous *per se* and things dangerous *sub modo*: *e.g. Collis* v. *Selden* (1868) L. R. 3 C. P. 495 (Willes J.); *George* v. *Skivington* (1869) L. R. 5 Ex. 1; *Heaven* v. *Pender* (1883) 11 Q. B. D. 503 (Cotton and Bowen L.JJ.); *Le Lievre* v. *Gould* [1893] 1 Q. B. 491 (Bowen L.J.); *Latham* v. *Johnson* [1913] 1 K. B. 398, 419: 'the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be' (Hamilton L.J.).

[26] This could be illustrated from a large number of cases, of which the following, all already cited, are examples in different connections: *Hearne* v. *Garton*, *Heaven* v. *Pender*, *Ilford U. C.* v. *Beal*, *Farrant* v. *Barnes*, *MacCarthy* v. *Young*, *Manton* v. *Brocklebank*, *Noble* v. *Harrison*, *Redhead* v. *M. Ry. Co.*, *Williams* v. *E. India Co.* *Humphries* v. *Cousins* (1877) 2 C. P. D. 239, which was approved in *Firth* v. *Bowling Iron Co.* (1878) 3 C. P. D. 254, is no exception to the general rule, if correctly explained by Branson J. in *Ilford U. C.* v. *Beal* [1925] 1 K. B. 671. The judgment of Blackburn J. in *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314 has been preferred to that of Lush and Quain JJ. by Farwell L.J. in *Barker* v. *Herbert* [1911] 2 K. B. 633 and Wright J. in *Noble* v. *Harrison* [1926] 2 K. B. 332. The judgment of Crompton J. in *Brass* v. *Maitland* (1856) 6 E. & B. 471 has been preferred to that of Lord Campbell C.J. and Wightman J. by Willes J. in *Hutchinson* v. *Guion* (1858) 5 C. B. (N.S.) 149, by Vaughan Williams L.J. in *Bamfield* v. *Goole and Sheffield Transport Co., Ltd.* [1910] 2 K. B. 94, Atkin J. in *Mitchell, Cotts & Co.* v. *Steel Bros.* [1916] 2 K. B. 610, and Mr. Carver, Carriage by Sea, art. 278. On the other hand, Fletcher Moulton and Farwell L.JJ. in *Bamfield's Case*, *supra*, McCardie J. (*semble*) in *Transoceanica Societa Italiana* v. *Shipton* [1923] 1 K. B. 31, Scrutton L.J. in *G. N. Ry. Co.* v. *L. E. P. Transport and Depository, Ltd.* [1922] 2 K. B. 742, and in his book on Charterparties, the writers in Halsbury's Laws of England (iv, 101; xxi, 371; xxvi, 101), and Mr. Leslie in Law of Transport by Railway, p. 31, accept the view of the majority of the Court in that case. If that be correct, we must treat the case of delivery of goods to a common carrier as an exception to the general rule. It is based on an implied warranty in contract.

[27] See pp. 386—387.

[28] *Mansel* v. *Webb* (1918) 88 L. J. K. B. 323. Bankes L.J. in *Musgrove* v. *Pandelis* [1919] 2 K. B. 43, 47, whilst imposing liability for a fire started by a motor-car, takes a different view: 'The expectation of danger is not the basis of the principle of *Rylands* v. *Fletcher*. A thing may be dangerous although the danger is unexpected.'

[29] *Brass* v. *Maitland* (1856) 6 E. & B. 471 (Crompton J.); *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314 (Blackburn J.); *Clarke* v. *Army and Navy Co-operative Society* [1903] 1 K. B. 155 (Mathew L.J.); *White* v. *Steadman* [1913] 3 K. B. 340 (Lush J.). It is submitted that, properly considered, Parke B.'s judgment in *Longmeid* v. *Holliday* (1851) 6 Ex. 761 is to the same effect.

took a different view. He did not think that the defendants could be made liable because they might by the exercise of reasonable care have known of the defect in the ginger-beer bottle. He founded himself upon the judgment of Hamilton J. in *Blacker* v. *Lake and Elliot*.[31] Hamilton J. had said: 'A knowledge of the danger is the foundation of the obligation to warn. . . . In the present case all that can be said is that the defendants did not know that their lamp was not perfectly safe . . . but that had they been wiser or more experienced engineers they would then have known what the plaintiff's experts say they ought to have known.' But the means of knowledge may be present, and yet it might be unreasonable to expect the defendant to avail himself of those means of knowledge. The mere fact that the knowledge could have been obtained is not conclusive that there has been a failure of reasonable care to acquire it.[31a] It was quite possible for Lush J. to concur in the allowance of the appeal in *Blacker's Case* without concurring in this particular *dictum*, as his subsequent judgment in *White* v. *Steadman*[32] shows.

The true distinction is not, it is submitted, between the dangerous or non-dangerous character of the thing inherently, but between those circumstances in which the defendant will be allowed to deny the dangerous character of his act or undertaking and those in which he will not. And it seems just the kind of question to which a jury can provide the best answer: Was the plaintiff entitled to impose the risk of loss upon another without himself running the risk of paying any damages?

But it is not every taking of a risk of loss or injury to others that involves the taker in liability to make compensation. We have rejected the test of inherent dangerousness and substituted that of *de facto* danger and knowledge. But that is not enough. Acts may be known to be *de facto* dangerous, and yet impose no liability if loss ensues. One further test to be applied, at least so far as the rule in *Rylands* v. *Fletcher* is concerned, is: Was the defendant acting in the course of the natural or the non-natural user of his land?

This criterion does not appear in the judgment of the

The words 'although discoverable by the exercise of ordinary care' must be read in connexion with the later words 'the defendant not knowing or having any reason to believe it was not perfectly safe.'

[30] [1913] 3 K. B. 351.

[31] (1912) 106 L. T. 533, 537.

[31a] But Mathew L.J. in *Clarke* v. *Army and Navy Co-operative Society* [1903] 1 K. B. 155 seems to have treated 'the means of knowing' as sufficient to found liability.

[32] [1913] 3 K. B. 340.

Exchequer Chamber in *Fletcher* v. *Rylands*, and is generally said to have had its genesis in the speech of Lord Cairns in the House of Lords in the following well-known passage [33]:

'The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. . . .

'On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land . . . that which the defendants were doing they were doing at their own peril.'

But the credit for this conception of the rule in fact should be given to Manisty Q.C. who based his argument upon this distinction both in the Exchequer [34] and in the House of Lords,[35] when he used the word 'ordinary' instead of 'natural.' Or perhaps we should more properly lay this baby at the door of Bramwell B., who said in *Bamford* v. *Turnley* [36]: 'What has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land.'

The validity of this distinction has been denied. So Sir John Salmond said [37]:

'Such a distinction has little in principle to recommend it. What is the natural use of land? Is it natural to build a house on it, or to light a fire? Almost all use of land involves some alteration of its natural condition, and it seems impossible to say how far this alteration may go before the use of the land becomes non-natural or extraordinary, so as

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33 (1868) L. R. 3 H. L. 330, 338—339.
34 (1865) 3 H. & C. 774.
35 (1868) L. R. 3 H. L. 330, 336.
36 (1860) 3 B. & S. 62, 83.
37 Torts (7th ed.), p. 347. Cp. Jeremiah Smith in Harvard Essays on the Law of Torts, p. 216.

to bring the rule in *Rylands* v. *Fletcher* into operation. Moreover, if there is one kind of use more natural than another it is the keeping of cattle; yet cattle-trespass is a typical instance of the application of this rule of strict responsibility, and is indeed the historical source of the general principle.'

Dr. Charlesworth points out[38] that Lord Cairns gave *Smith* v. *Kenrick*[39] as an example of natural, and *Baird* v. *Williamson*[40] as an example of non-natural, user of land. 'The explanation given of a non-natural user of land shows that what Lord Cairns had in mind,' he says, 'was the distinction between "natural" and "artificial" water; . . . as far as the actual user of the land is concerned it is impossible to define with precision what is a natural, and what a non-natural, user of land.'[41]

It is doubtful, perhaps, how clearly Lord Cairns had in mind the difference between things naturally on the land and things brought upon the land in the course of natural user, but his use of the words 'in the ordinary course of the enjoyment of the land' prevents us from accepting Dr. Charlesworth's explanation of his speech as adequate. And the distinction between the natural and non-natural user of land has been accepted, as we shall see, in a large number of subsequent cases. But our judges have recognized that there is a real difficulty in stating what is a natural and what is a non-natural use of land, whilst accepting the distinction as part of the law.[42] Kekewich J. in *National Telephone Co.* v. *Baker*[43] expressed his opinion that 'extraordinary' was a better word than 'non-natural' in the statement of the rule in *Rylands* v. *Fletcher*, and that term has been since adopted by Lord Alverstone C.J. and Farwell L.J.,[44] and by Wright J.[45]

'Extraordinary' seems to give the right expression to the doctrine, and other judges have given the same meaning to 'non-natural' in their statement of the rule, though by the use of different words. So Lord Moulton in delivering the advice of the Judicial Committee in *Rickards* v. *Lothian*,[46]

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[38] Liability for Dangerous Things, p. 148.

[39] (1849) 7 C. B. 515. [40] (1863) 15 C. B. (N.S.) 376.

[41] Cp. Clerk and Lindsell, Torts (8th ed.), p. 386.

[42] *Att.-Gen.* v. *Tomline* (1879) 12 Ch. D. 214 (Fry J.); (1880) 14 Ch. D. 58 (Cotton L.J.).

[43] [1893] 2 Ch. 186. Cp. *Sutton* v. *Card* [1886] W. N. 120, 'ordinary way of using a man's own property.'

[44] *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14.

[45] *Noble* v. *Harrison* [1926] 2 K. B. 332. But note that Bramwell B. in *Bamford* v. *Turnley*, in the passage cited, *supra*, distinguished 'ordinary' from 'natural.'

[46] [1913] A. C. 263, 280.

said that in order to fall under the rule in *Rylands* v. *Fletcher* the use to which the defendant's land is put must be 'some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.' Lord Buckmaster speaks [47] of 'the use of land by one person in an exceptional manner that causes damage to another,' and Farwell L.J. of 'abnormal user',[48] whilst Wright J. seems to hold [49] that 'usual and normal' things do not fall within the rule.

Bramwell B. in *Nichols* v. *Marsland* [50] regarded 'the reasonable use of property in the way most beneficial to the community' as outside the scope of the rule, and the language of Lord Moulton in delivering the judgment of the Judicial Committee in *Rickards* v. *Lothian* [51] comes near to laying down this criterion of reasonableness:

> 'The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life . . . in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril.'

But here we are faced with a difficulty. It is no answer to an action of nuisance that the defendant is only making a reasonable use of his own property.[52] The rule in *Rylands* v. *Fletcher* is in some respects so closely related to the law of nuisance (though not to be identified with it as it has sometimes been identified) that it would be unsafe to take the reasonableness of the user of the property as in itself and alone taking a case out of the ambit of the rule. To do that the user must not only be reasonable, but ordinary, normal or natural.

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[47] *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* [1921] 2 A. C. 465, 471.

[48] *Barker* v. *Herbert* [1911] 2 K. B. 633, 645.

[49] *Noble* v. *Harrison* [1926] 2 K. B. 332, 342; cp. Fletcher Moulton L.J. in *Barker* v. *Herbert* [1911] 2 K. B. 633.

[50] (1875) L. R. 10 Ex. 255, 259. Cp. 'ordinary and reasonable': Wright J. in *Gill* v. *Edouin* (1894) 15 R. 109, and in *Blake* v. *Woolf* [1898] 2 Q. B. 426.

[51] [1913] A. C. 263, 281. Cp. Farwell L.J. in *Barker* v. *Herbert* [1911] 2 K. B. 633.

[52] *Aldred's Case* (1610) 9 Co. 57; *Bamford* v. *Turnley* (1860) 3 B. & S. 62, explaining *Jones* v. *Powell* (1628) Palm. 536 Hutton 135; *St. Helens Smelting Co.* v. *Tipping* (1865) 11 H. L. C. 642; *Broder* v. *Saillard* (1876) 2 Ch. D. 692.

Perhaps we shall find the true principle in the judgment of Bramwell B. in *Bamford* v. *Turnley*[53]:

> 'Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. . . . There is an obvious necessity for such a principle. . . . It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.'

So Jones J. in an old case[54] said: 'Where there is an ordinary use of sea-coal no action lies because it is a matter of necessity and there is mutual sufferance.'

Historically the rule is derived from the law relating to the working of mines.

It is well settled that if you work mines so as to cause damage to your neighbour you will be liable unless you work them in an ordinary way: but if the mines are worked in the ordinary manner there will be no right of action.[55] This rule was stated by Lord Blackburn in *Wilson* v. *Waddell*,[56] in the following language:

> 'The general rule of law . . . is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals.'

Two years later Cotton L.J., referring to the cases already cited, explained the principle underlying this branch of the law in *Hurdman* v. *N. E. Ry. Co.*[57]: the excavation and raising of minerals so that water gravitates on to a neighbour's property is an exception to the general rule of liability, because it

> 'is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to

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53 (1860) 3 B. & S. 62, 83—84.
54 (1628) Palm. 536, 538.
55 Cp. *Dunn* v. *Birmingham Canal Co.* (1872) L. R. 7 Q. B. 244; 8 Q. B. 42; *Crompton* v. *Lea* (1874) 19 Eq. 115.
56 (1876) 2 App. Cas. 95, 99.
57 (1878) 3 C. P. D. 168, 174.

such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with the enjoyment by something in the nature of nuisance . . . is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land.' [58]

In *Whalley* v. *L. & Y. Ry. Co.*[59] Brett M.R. put the reason for the rule in a different form:

'If a man be so situated with regard to his neighbour that by an ordinary act in the use of his neighbour's land, such as by deep ploughing, the ordinary flow of water is sent from that land on to his land he would be in the position of having his land subject to the defect, and therefore could not recover for the injury he might so suffer.'

Then in *Batcheller* v. *Tunbridge Wells Gas Co.*[60] Farwell J. carried over the idea of non-natural user to gas: 'it was clearly a non-natural use of the land to put gas-pipes there.' The laying of a submarine cable was held by the Judicial Committee to be a non-natural use of property in *Eastern & S. African Telegraph Co.* v. *Cape Town Tramways* [61]; the laying of creosote blocks as road paving by the Court of Appeal in *West* v. *Bristol Tramways*,[62] and Farwell L.J. relied upon the distinction between natural and non-natural as fundamental in *Barker* v. *Herbert*,[63] and again in *Latham* v. *R. Johnson & Nephew*.[64] In the same year the distinction was one ground for the decision of the Judicial Committee of the Privy Council in *Rickards* v. *Lothian*.[65] A Divisional Court regarded a large heap of bones at a manure manufactory as arising in the ordinary course of business and bones as a natural but valuable waste product from rearing sheep or cattle for slaughter in *Stearn* v. *Prentice Brothers*.[66] In *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*,[67] Lord Sumner regarded the storage of D.N.P. as a non-natural user of land, whilst in *Ilford U. D. C.* v. *Beal and Judd*,[68] and *St. Anne's Well Brewery Co.* v. *Roberts*,[69]

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[58] A similar distinction was recognized in *West Cumberland Iron and Steel Co.* v. *Kenyon* (1879) 11 Ch. D. 782; *Att.-Gen.* v. *Tomline* (1879) 12 Ch. D. 214; (1880) 14 Ch. D. 58.

[59] (1884) 13 Q. B. D. 131, 141.

[60] (1901) 84 L. T. 765, 766.

[61] [1902] A. C. 381.

[62] [1908] 2 K. B. 14.

[63] [1911] 2 K. B. 633.

[64] [1913] 1 K. B. 398.

[65] [1913] A. C. 263.

[66] [1919] 1 K. B. 394.

[67] [1921] 2 A. C. 465. See READ v. LYONS [1947] AC 156

[68] [1925] 1 K. B. 671.

[69] (1928) 140 L. T. 1.

a retaining wall was held to involve the occupiers in no liability because it was erected in the ordinary normal use of the defendants' land. In *Noble* v. *Harrison*,[70] non-poisonous trees were held by a Divisional Court to fall under the same principle of exemption.

The distinction between the natural and non-natural user of land is often confused with the distinction between things naturally on the land and those which are brought or artificially created there. We have already seen that to some extent this confusion can be detected in Lord Cairns' speech itself. But in fact there is nothing in common between the two conceptions except the common use of the word 'natural.' If we wish to think clearly we must regard the two questions as entirely distinct.

A more serious confusion has crept into certain judgments between the two distinctions of which this paper treats—dangerous and non-dangerous things, and natural or non-natural user. Thus in *Barker* v. *Herbert*[71] Fletcher Moulton L.J. said: 'This is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous of itself. There is nothing unusual or necessarily dangerous in an area protected by railings,' and in *Latham* v. *Johnson*[72] Farwell L.J. spoke of 'the introduction into the land . . . of something out of the normal user of land, known to the owners to be dangerous,' whilst very recently Lawrence L.J. said[73]: 'The keeping of this wall by the plaintiffs on their property was not an abnormal or unnatural use of their property in the situation in which that property was found. . . . I fail to see how the plaintiffs can be charged with having brought upon their property something which is of a dangerous or unusual character.' It will be noted that these were all Chancery lawyers.[74] But the confusion is obvious: water, filth, cattle, and many other so-called *Rylands* v. *Fletcher* objects are perfectly usual objects.

In a very recent judgment[75] Eve J. seems to have been guilty of confusion on both points. The defendant had on his land certain rocks which were in imminent danger of falling, and the learned judge said:

'The case was not one where a landowner has brought on

[70] [1926] 2 K. B. 332.
[71] [1911] 2 K. B. 633, 642.
[72] [1913] 1 K. B. 398, 406.
[73] (1928) 140 L. T. p. 8.
[74] But see also Wright J. in *Noble* v. *Harrison* [1926] 2 K. B. 332.
[75] *Pontardawe R. D. C.* v. *Moore-Gwyn* (1929) 45 T. L. R. 276, 277.

> his land something of an unusual nature which is dangerous in itself. The rocks were . . . part of the natural formation. . . . The action was, therefore, an attempt to impose on an owner, who was using and enjoying his land in the ordinary manner of its use and reasonably, liability for damage sustained by the property of another through natural agencies.'

And he apparently relied upon *Giles* v. *Walker*[76] and *Blake* v. *Woolf*[77] as if the point decided in the two cases was the same.

If we avoid these pitfalls it appears a perfectly valid distinction to take between the normal and abnormal user of land, and to base it on the principle of mutual sufferance, as expounded by Bramwell B. in *Bamford* v. *Turnley*.[78] Professor Bohlen has shown[79] very clearly how this principle that the *prima facie* liability may be rebutted by showing that the defendant has acted in the ordinary course of user of his own land has added to the flexibility of the common law:

> 'The opinion of Lord Cairns deals with the question of social and economic expedience. . . . The question is not governed by any hard and fast rule. It is not measured by any definite and pre-existing standard. It represents the opinion of the Court, which itself reflects the sum of prejudices, and the political, social and economic convictions of the dominant classes of which they themselves are a part. As such it is and necessarily should be elastic, changing with the economic and social needs of the era and locality, and being largely determined by the settled economic and social convictions prevalent at the particular time and place.'

And he later[80] draws a most interesting comparison in the light of these remarks between the development of the common law in England and in America.

There is much to be said for any rule which gives elasticity to the common law: for it is by its flexibility that the common law has life. 'In these matters,' said Dodderidge J. in an early case,[81] 'the law is like Apparel, which changes with the times,' and there is a recognition of this principle in the advice of the Judicial Committee in *Rickards* v. *Lothian*, already cited.[82] A distinguished County Court judge, Judge Barnard Lailey

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[76] (1890) 24 Q. B. D. 656.
[77] [1898] 2 Q. B. 426.
[78] *Supra*, p. 393.
[79] Studies in the Law of Torts, pp. 350-1.
[80] Pp. 368—398.
[81] *Jones* v. *Powell* (1628) Palm. 536.
[82] *Supra*, pp. 391—392.

K.C., whose judgment[83] we may not quote as an authority, though we may refer to it as an interesting discussion involving several of the topics of this article, speaking recently of a common house-lamp, said: 'a possible source of danger it is, just as is the kitchen fire, the bedroom candlestick, or the cat on the hearth; but . . . it would be straining the *Rylands* v. *Fletcher* principle beyond breaking-point to hold it to apply to such things as these.' He regarded the Fires Prevention (Metropolis) Act, 1774, 'as a recognition by Parliament that the developments of social life called for a relaxation of the rigid common-law rule and as removing from the wild-beast category common every-day appliances for the provision of household fire and light.'

It is submitted that Lord Cairns' principle has given the Courts the power to do within the necessary limitations what the Legislature did in 1774. If so interpreted, the principle helps to define the circumstances in which a man cannot take the risk of injuring another without also taking the risk of paying compensation.

But, if this be correct, it must be recognized that cattle-trespass is an exception: a rigid rule of the common law, deeply rooted in its history, it has withstood the rationalization of the law by Lord Cairns' principle.[84] It is logically an independent rule outside the general principle which we have been discussing.

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[83] *P.-M.-G.* v. *Latter* (1928) 166 L. T. Journal, 152.
[84] See Holdsworth, History of English Law, viii, 470-1.

THE CRIMINAL RESPONSIBILITY OF CORPORATIONS.

C. R. N. Winn.

WHERE it has been sought to impose on a corporation liability for crimes committed by its agents in the course of its business and their employment, all the intellectual obstacles which had to be surmounted before imposing corporate liability for tort have been at least equally obstructive, besides the further difficulty that the criminal law knows no such doctrine as 'respondeat superior.' A man is criminally liable for his own acts and for them alone; and in order to establish his guilt it is necessary to show that two elements concur: the *actus* must be *reus*, and the *mens, rea*. Again there is the difficulty that a corporation is not susceptible to corporal punishment.

It was not possible on the view which the English Courts took of the directors of a corporation, as being the *agents* of the corporation, to impose criminal liability for their acts upon the corporation except in the following special circumstances. Where a statute has laid upon a corporation a legal duty to execute certain works and the works have not been executed, it was held in 1842 in *R.* v. *Birmingham and Gloucester Ry. Co.*[1] that the corporation may be indicted and fined for its non-feasance. But it was there said, *per* Patteson J., that a corporation may not be indicted '*for a felony, or for crimes involving personal violence.*'[2] In *R.* v. *Severn and Wye Ry. Co.*[3] it was assumed that an indictment would have lain against a railway company for not maintaining its permanent way. In *R.* v. *Tyler Commercial Co.*[4] Bowen L.J. held that where a duty is imposed on a company by statute, such as the duty to register the names of its members imposed by the Companies Act, 1862, a breach of such duty is indictable in the absence of any indication to the contrary in the statute. The Supreme Court

[1] 3 Q. B. 223.
[2] *Ibid.* 232. Doubt was cast upon this qualification in *State* v. *Baltimore and O. R. R.* 15 W. Va. 362; *State* v. *Rowland Lumber Co.* 153 N. C. 610.
[3] (1819) 2 B. & Ald. 646.
[4] [1891] 2 Q. B. 588.

of Canada has held in *Union Colliery Co.* v. *H.M. the Queen*,[5] that under section 213 of the Criminal Code a corporation may be indicted for *omitting without lawful cause to perform the duty of avoiding danger to human life* from anything under its control, the company in the particular case having failed to maintain a bridge over which it ran trains.

By these cases of non-feasance in breach of a statutory duty the English Courts made the first inroad upon the proposition so succinctly stated by Holt C.J.[6]: 'A corporation is not indictable but the particular members of it are.'

Within a very short interval after the decision in 1842 that a corporation was indictable for non-feasance in breach of statutory duty, the Courts were compelled to recognize that having gone so far they could not pause consistently without holding it to a like responsibility for acts done in breach of a statutory duty which amounted to a misfeasance. No satisfactory distinction could be drawn between the two kinds of breaches of duty, as was clearly demonstrated in the judgment of Lord Denman C.J. in *R.* v. *G. N. Ry. Co.*[7] In this case a railway company was held indictable for cutting through and obstructing a highway while constructing its line along a course not authorized by statute; since, as the Chief Justice said, a man who is under a statutory duty to build a bridge with parapets, and not to build any other kind, but builds one without parapets, may with equal propriety be said to have failed to build a secured bridge or to have built an unsecured one—in either case the essence of the offence is disobedience to the statute. Similarly in *Evans & Co. Ltd.* v. *L. C. C.*[8] a company committed a criminal offence by keeping open their shop every afternoon in the week in violation of the Shops Act, 1912, s. 4, which might be termed a misfeasance or a non-feasance according as attention is concentrated on the idea of *keeping open* or on that of *failing to close*. A Massachusetts corporation was held liable for misfeasance in improperly constructing a bridge which constituted a nuisance, in *Commonwealth* v. *Proprietors of New Bedford Bridge*.[9] The basis of liability in this class of cases is that the act either was done in breach of a statutory duty or amounted to a public nuisance in the nature of a tort committed against the public at large. The liability was expressly put on the latter ground in *State* v. *Passaic County Agricultural Society*.[10]

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[5] 31 Can. S. Ct. 81.
[6] *Anon.* (1700) 12 Modern, 559.
[7] (1846) 9 Q. B. 315.
[8] [1914] 3 K. B. 315.
[9] (1854) 2 Gray, 339.
[10] 54 N. J. Law, 260.

Liability to criminal penalty has also been imposed by the English Courts for violations of various statutes which make the simple commission of a certain wrongful act a crime, irrespective of any mental element of *mens rea*: cf. *Provincial Motor Cab Co.* v. *Dunning.*[11] So, too, Messrs. Studebakers, Ltd. were subjected to a penalty for breach of the Road Vehicles (Trade Licenses) Regulations, 1922, made under section 12 of the Roads Act, 1920.[12] Under these regulations limited trade licenses might be issued permitting use of vehicles for specified purposes, 'provided that not more than two persons in addition to the driver shall be carried.' A motor car belonging to the defendants, in respect of which they held only a trade license, was driven on a public road by their servant, carrying more than two passengers, without the knowledge and contrary to the express orders of the defendants. It was held that *mens rea* was not an essential element of the offence and that the defendants were liable to a penalty: *Griffiths* v. *Studebakers, Ltd.*[13] In this case Lord Hewart C.J. expressly adopted the *dictum* of Atkin J. in *Mousell Bros.* v. *L. & N. W. Ry. Co.*[14] 'While *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case *the principal is liable if the act is in fact done by his servants.*' Similar language was employed by Channell J. in *Pearks, Gunston and Tee, Ltd.* v. *Ward.*[15] 'There are exceptions to this rule [that *mens rea* is essential to an offence] in the case of quasi-criminal offences, . . . where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, at any rate in default of payment of a fine.'[16]

As a further example may be cited the recent indictment at the Central Criminal Court of the General Steam Navigation Co. Ltd. as owners of the steamer *Eagle* for receiving on board a greater number of passengers than was allowed by the steamer's certificate, in violation of the Merchant Shipping Act. A fine of 100 guineas was imposed.

It was held that a corporation is within the meaning of the term 'person' where it occurs in such statutes as the above, by force of section 2 of the Interpretation Act, 1889: 'In the

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[11] [1909] 2 K. B. 599.
[12] 10 & 11 Geo. 5, c. 72.
[13] [1924] 1 K. B. 102.
[14] [1917] 2 K. B. 836, 845.
[15] [1902] 2 K. B. 1.
[16] Cf. *per* Wright J. in *Sherras* v. *de Rutzen* [1895] 1 Q. B. 918, at p. 921.

construction of every enactment relating to an offence punishable on indictment or on summary conviction . . . the expression "person" shall, unless the contrary intention appears, include a body corporate.' An instance of a statute in which an intention appears that the term 'person' should not include a corporation, is afforded by the Lotteries Act, 1823, section 41 of which enacted that every 'person' publishing a proposal for a lottery should be deemed a rogue and vagabond and punished by imprisonment and whipping.[17]

In America, likewise, corporations have been freely indicted and convicted of offences not involving a mental element and consisting rather in a breach of an absolute statutory duty or a wrong in the nature of a public tort: for criminal nuisance,[18] Sabbath breaking,[19] obstructing a public highway,[20] usury,[21] violating eight hour law,[22] furnishing intoxicating liquor to a minor,[23] and advertising to practise medicine, not being a registered physician.[24]

Liability is imposed in such cases on the theory that considerations of public policy outweigh the claims which the corporation might assert to immunity on the ground that it had, itself, no knowledge of the agent's act. As was said by the Supreme Court of the United States in *N. Y. C. and H. R. Ry. Co.* v. *U.S.*[25]: 'The act of the agent . . . may be controlled, *in the interest of public policy*, by imputing his act to his employer and imposing penalties on the corporation for which he is acting.' It is an instance of policy overriding principle. This last-cited case is closely parallel to the English case of *Mousell Bros., Ltd.* v. *L. N. W. Ry. Co.*[26] By the Railways Clauses Consolidation Act, 1845, s. 98, every person being the owner of goods passing upon a railway shall on demand give to the collector of tolls an exact account in writing of the goods. By section 99, if such owner fail to give such account, or if he give a false account, with intent to avoid payment of any tolls he shall be liable to a penalty. It was held that a limited company, owners of goods, may be guilty, even without *mens rea*, of giving a false account with intent to

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17 *Hawke* v. *Hulton & Co.* [1909] 2 K. B. 93.
18 *State* v. *Morris and Essex R. R. Co.* 23 N. J. L. 360.
19 *State* v. *Baltimore and O. R. R.* 15 W. Va. 362.
20 *State* v. *Baltimore and O. and C. R. R.* 120 Ind. 298; 22 N. E. 307.
21 *State* v. *First National Bank*, 2 S. Dak. 568.
22 *U.S.* v. *John Kelso Co.* (1898) 86 F. 304.
23 *Southern Exp. Co.* v. *State*, 217 1 Ga. App. 700.
24 *People* v. *John H. Woodbury Dermatological Inst.* (1908) 192 N. Y. 454.
25 212 U.S. 481.
26 [1917] 2 K. B. 836.

avoid payment where their manager actually gives a false account with such intent.[27]

Under the Sale of Food and Drugs Act, 1875, s. 6, which enacted that 'no person' shall sell to the prejudice of a purchaser any food or drugs not of the nature, substance and quality demanded by the purchaser, a corporation was held criminally liable in *Pearks, Gunston & Tee, Ltd.* v. *Ward*,[28] and Channell J. thought that they might have been liable under section 3 which, by exempting the defendant on proof of his innocence, shows that a mental element is conceived to be an element in the offence. In *Chuter* v. *Freeth*[29] an incorporated company was convicted under the Sale of Food and Drugs Act, 1899, s. 20, sub-s. 6, whereby every person who in respect of a food or drug gives a purchaser a false warranty in writing is liable to a fine unless he can show that he had reason to believe the statements made. Lord Alverstone C.J. said that a corporation 'can give a warranty through its agents, and through its agents it can believe or not believe . . . that the statements in the warranty are true.' Such a finding certainly involves the attribution of a mental state, belief, to a corporation; in fact the relevant state of belief was the agent's: by a fiction the belief is attributed to, and said to be that of, the corporation. Hitherto the only offences for which criminal liability had been imposed on a corporate principal were such that the significant intent was that of the *servant*. Now the state of mind of the actual defendant is treated as relevant. It is thus a step forward to hold a corporation liable under a statute which defines the offence as depending on intent or knowledge.[30]

In America, a corporation has been held guilty of an offence under the Espionage Act of 1917, s. 3, consisting of publishing matter calculated to cause insubordination among the troops with intent to cause such disaffection. Learned Hand J. said that: 'There is no distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose. Each is merely an imputation to the corporation of the mental condition of its agents.'[31] A

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[27] S.C. *per* Atkin J.: 'The penalty is imposed upon the owner for the act of the servant if the servant commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal' (p. 846).

[28] [1902] 2 K. B. 1.

[29] [1911] 2 K. B. 832.

[30] Cf. *R.* v. *Ascanio Puck & Co.* (1912) 76 J. P. 487.

[31] *U.S.* v. *Nearing*, 252 F. 223.

corporation was convicted of the offence of 'knowingly depositing in the mails unmailable matter': *U. S.* v. *N. Y. Herald Co.*[32] A corporation is capable of the statutory offence of knowingly and fraudulently concealing assets from its trustee in bankruptcy, which is a criminal fraud.[33] In an *obiter dictum* Hiscock J. said: 'At times Courts have halted at the suggestion that a corporation can be guilty of a crime whereof the element of intent was an essential ingredient. But this doctrine . . . may now be regarded as established and there is nothing therein which is unjust or illogical.'[34] That a corporation is capable of forming a guilty intent and of having the necessary knowledge to commit an offence, provided that the officers who are capable of voicing the will of the corporation have such knowledge or intent, has been held in *Grant Bros. Const. Co.* v. *U.S.*[35] In *State* v. *Salisbury Ice Co.*[36] a corporation was convicted of obtaining money by false pretences, an agent having intentionally given short weight, a statutory crime. A corporation has been held guilty of a criminal contempt in publishing statements calculated to prejudice the fair trial of an indictment: *R.* v. *J. G. Hammond & Co., Ltd.*[37] Cf. the Massachusetts case, *Telegram Newspaper Co.* v. *Commonwealth*,[38] in which Field J. said: 'There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.' So too Hough J.: 'It seems to me as easy and logical to ascribe to a corporation an evil mind as to impute to it a sense of contractual obligation . . . there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest.'[39] In Bishop's New Criminal Law[40] the author maintains that: 'Within the sphere of its corporate capacity . . . (a corporation) has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man. . . .' The City Magistrates' Court of New York convicted the Tyson Ticket Corporation of the larceny of two Metropolitan Opera tickets purchased on behalf of a customer but pledged by the corporation to secure a loan to itself.[41]

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[32] 159 F. 296.
[33] *Cohen* v. *U.S.* 157 F. 651; *Kaufman* v. *U.S.* 212 F. 613.
[34] Cf. *People* v. *Rochester Ry. and L. Co.* 195 N. Y. 102, at p. 105.
[35] 114 Pac. R. 955.
[36] 166 N. C. 366.
[37] [1914] 2 K. B. 866.
[38] 172 Mass. 294, at p. 297.
[39] *U.S.* v. *MacAndrews and Forbes Co.* 149 F. 823, at p. 836.
[40] § 417.
[41] *People* v. *Tyson & Co. Inc.* 50 N. Y. L. J. 1829.

There is a *dictum* of Lord Blackburn in the House of Lords in *Pharmaceutical Society* v. *London and Provincial Supply Association, Ltd.*,[42] to the effect that a corporation may be indicted for publishing a libel, and such an indictment was held in America to lie in *State* v. *Atchison*,[43] and in *People* v. *Star Co.*[44]

The Merchandise Marks Act, 1887, s. 2, sub-s. 1, allows the accused to negative an intent to defraud on being charged with the offence of applying a false description to goods. Yet a corporation may be convicted of this offence.[45]

In America, indictments have been successfully prosecuted against corporations for criminal conspiracy.[46] Conspiracy, of all crimes *par excellence*, demands a guilty mental element, and where the conspirators are corporations the conspiring minds are in fact the minds of the directors, or other primary representatives. It is submitted that no mere conspiracy of inferior agents could affect the corporation with criminal guilt. If the guilty intention in the minds of the primary representatives is attributed to the corporation in this case where, more than anywhere, it is the vital element of the offence, it seems that it will always be proper to attribute to a corporation the guilty state of mind of its primary representatives when they do criminal acts on its behalf in the exercise of its powers.

In England by the Act, 24 & 25 Vict. c. 100, ss. 5, 71, on a conviction for manslaughter the Court may at its discretion impose penal servitude for life or such fine as it shall see fit, either in addition to or without any other punishment, and may further require the offender to enter into his own recognizances and to find sureties for keeping the peace. Thus a criminal sanction was provided to which a corporation could be amenable, and the practical difficulties in the way of imposing criminal liability were further smoothed away in a recent measure. By the Criminal Justice Act, 1925,[47] a method of procedure is provided whereby an indictment against a corporation can be presented to a grand jury on an order made by examining justices, and such an order is to be deemed a committal for trial. Should the grand jury of any assize or quarter sessions return a true bill against a corporation, the

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[42] (1880) 5 App. Cas. 857, 870.
[43] 3 Lea (Tenn.), 729.
[44] 120 N. Y. Supp. 498.
[45] *Starey* v. *Chilworth Gunpowder Co.* (1889) 24 Q. B. D. 90.
[46] *State* v. *Eastern Coal Co.* 70 Atl. Rep. 1; *U.S.* v. *MacAndrews and Forbes Co.* 149 F. 823.
[47] 15 & 16 Geo. 5, c. 86, s 33.

corporation may, on arraignment, enter in writing by its representative a plea of guilty or not guilty, and where an individual charged with the same offence would be entitled to be tried by jury a claim to be so tried may be made on behalf of the corporation by its representative. Prior to this Act it had been held in *R.* v. *Daily Mirror Newspapers, Ltd.*,[48] that a limited company cannot be committed for trial on an indictment. The defendant company was charged before a justice of the peace with corrupt practices at a parliamentary by-election, committed for trial, and indicted at Hertford Assizes. The indictment was removed by a writ of *certiorari* to the King's Bench Division, where the defendants, having pleaded 'not guilty,' were tried before Rowlatt J. Thinking that the point was arguable whether a limited company could be committed for trial within the meaning of section 1, sub-section 2 of the Grand Juries (Suspension) Act, 1917, or at all, the learned judge allowed the case to go to the jury, who found the company guilty, and they were convicted and sentenced. On appeal it was held that on the wording of the Grand Juries (Suspension) Act there could be no proper committal for trial of a limited company.

Notwithstanding the evident tenor of the 1925 Act, the first prosecution under the new procedure was quashed by Finlay J. in *R.* v. *Cory Bros., Ltd.*[49] An indictment of a colliery company and three of its engineers for causing the death of one of the colliers by erecting a live electrical wire fence on their property was presented at Glamorgan Assizes. It was argued that the Act of 1925 never intended that a corporation could be indicted for a felony and that the section under which the indictment had been made was pure machinery. This objection was upheld by the learned judge on the ground that he was bound by authorities which showed quite clearly that in point of law an indictment would not be sustained against a corporation either for felony or for such a misdemeanour as that defined in the indictment (p. 817).

It is submitted that this result is not satisfactory, however well founded the decision may have been on interpretative grounds. In all likelihood a more detailed statement of the circumstances would reveal the fact that the moral responsibility for the erection of the fence lay with the directors. Probably so important a step was not taken without the sanction of a vote in a directors' meeting. The directors in their corporate capacity are, on such an hypothesis, the guilty parties, both

[48] [1922] 2 K. B. 530.
[49] [1927] 1 K. B. 810.

morally and legally, since their command to inferiors who had no practical alternative to obedience was the originating cause of the collier's death. The directors are guilty in their corporate capacity and should have been indicted in that capacity: in their corporate capacity they constitute to all practical intents the corporation itself, that is to say the enduring unit or entity predicated upon them, and upon the corporators who stand behind them but whose influence upon the policy of the company is largely negligible. When the primary representatives decided that the fence should be erected they came to the decision within the corporate *nexus*, and in procuring its construction they exercised the powers of the corporation vested in them as its controllers. The decision and the command were in every sense acts done because of, and for the sake of, the association. As individuals, it may be hazarded, the directors would each and all have shrunk from erecting on their own land such a barbarous man-trap as they collectively advocated under the influence of a property-owning unit predisposed to harshness towards a hostile and predatory faction. Corporations have no thoughts of their own, for they have no brains through which thought images may pass; the brains of the corporators are their own brains and not the corporation's. But the minds of the corporators, thinking in meeting assembled, exert a mutual influence which makes for definite purpose and firmness of attitude; where nine men of like opinions unite to prove to a tenth the infallibility of their position, each will be strengthened, confirmed and rendered more obdurate by the support of the others. Mutually stimulated they will go to excesses from which alone they would have shrunk. It is an inexplicable but plainly demonstrable phenomenon of the human mind that men do not think their own thoughts when in groups; each mind contributes something to the group, and is influenced by the thought impulses which are in play around it. The *intra vires* decisions and commands of a board of directors are factually, and should be legally, the decisions of the corporation and not of the individuals *qua* individuals; for a corporation is an entity in which individuals are united within a bond of association which modifies their mental processes.

It is urged that a corporation should be answerable criminally as well as civilly for acts of its primary representatives; and that the Courts, were they to impose this liability upon the corporate funds, would be working for the ends of justice and expediency, and at the same time bringing the law more into consonance with the views and concepts of intelligent

laymen. Divergence between legal rules and lay modes of thought is always to be avoided where conformity may be secured with no sacrifice of principle or of logical consistency. It is clear, on the one hand, that to seek to hold a corporation criminally liable for the acts of *all* its servants within the scope of their employment would be an innovation. The criminal law has never applied the maxim '*respondeat superior*,' and to seek to ingraft from without what has not taken spontaneous growth might prove an experiment foredoomed to failure.

But no such violence to established principles is threatened by the theory here put forward: the results to which it points a way are readily attainable on the reasoning of either of the main schools of thought, conformably to their particular conception of the nature of a corporation.

The fictionist creed declares that the Legislature has empowered a certain legal person, created by its own act of recognition, though predicated upon, and composite of, a group of human beings, to act within a certain scope as freely as any other legal person. Being from its nature physically incapable of itself performing acts, the corporation is intended by its creator to act through certain human beings whose appointment the Legislature either directs or approves. In the exercise of the powers thus bestowed upon the corporation, a crime is committed on its behalf and by one of the human beings selected to wield the corporate powers: should not the responsibility be laid upon the legal unit in whom the powers, which have been exercised, inhere? The Courts, which have long been aware that corporations assent to contracts and are deceived by misrepresentations, after a time perceived that they might be guilty of fraud and deceit, and should not now long remain oblivious of their capacity for crime. Regarded as a pure idea, a corporation can no more commit a crime than the idea of a man, but as a group entity it exerts an influence and gives its representatives motives and means, which come to them from outside themselves.

To the realist the problem presents no difficulty which is not readily soluble by deduction from his premise that the corporation is a real organism with a will and obedient members. The corporate will may entertain *mens rea* and the corporate hands, which are factually the hands of its representatives acting in their corporate capacity, may perform the *actus reus*, and full criminal responsibility should logically attach to the corporation. Given a punishment to which it is answerable, its liability appears to be fully established.

From the viewpoint adopted in this article the situation presents a slightly different aspect: a number of human beings, having agreed to combine and become incorporated for the accomplishment of a purpose, have contributed the legal powers, which they might have wielded themselves in their newly-acquired capacity as corporators, to be exercised either by a majority of their number, or, as is more usually the case, by elected representatives.

The persons so elected will be the primary representatives of the corporation, for in them and their successors in their posts the general powers of the corporation are permanently vested by a process preliminary to the complete organization of the corporation. The legal powers which inhered in the several corporators, in their special capacity as corporators, have been transferred into the primary representatives by one original preliminary act of consensual agreement or of legislative pronouncement. From that time onwards the general corporate powers will be vested in and exercisable by the primary representatives, objectively determined, that is to say by the human beings who from time to time are elected to fill their positions. The directors, or other primary representatives, will, in the normal case, be required to co-operate in the exercise of the corporate powers, which will be vested in them not severally but as a board. Now a board of directors is an entity able to be differentiated from the aggregate of its members, no less abstract than a corporation and equally incapable of factual acts. The acts and decisions of a majority of the board, on the principle of original representation, are attributed in law to the board, and will therefore be the acts of the corporation's primary representatives, and an exercise of the corporate powers. On the other hand, the act of a single member of the board, or even of a minority of the board, will not bind the corporation as an exercise of the corporate powers. These are vested in the board and not in the several members of the board. The acts upon which the board determines, and which are therefore an exercise of the corporate powers vested in the board of primary representatives, must, in the nature of things, be factually performed by the hands or mouth of a human being who may or may not himself be a member of the board. Whether the actor is himself a primary representative is for this purpose irrelevant: the significant question is whether he is acting on his own initiative or under the direct authority of the board of primary representatives. This will determine whether or not his acts are an exercise of the corporate powers

vested in the primary representatives. Thus a clear distinction is to be drawn between those acts of a person (in whom the corporate powers are not *individually* vested) which are merely performances of direct commands from the board of primary representatives, and acts done entirely on the initiative and sole discretion of the actor or merely within a general scope of authority. One should ask: was the act directly authorized by the board of primary representatives, or was it merely within a class of authorized acts, or was it an entirely unauthorized act? In the first case the act is by direct attribution the act of the corporation; in the other cases, if a corporate act at all, it is so only by the rule of *respondeat superior*. Exceptionally, the corporate powers may be primarily vested in a single representative, such as a bank president, and exercisable at his sole discretion, more or less uncontrolled by the will of an advisory committee. In such a case the same question will not arise, since all acts done by the primary representative within the scope of his authority as such will represent an exercise of the corporate powers.

Parliament has directed that the law shall attach corporate consequences to the exercise of the legal powers of the corporators which inhere in them in their corporate capacity: the acts of all the corporators, *qua* corporators, are in law, apart from any circumstance removing such powers from themselves, the acts of the corporation. It rests with the corporators to decide, subject to the will of the Legislature, whether they will themselves exercise the corporate powers and so remain the primary representatives of the corporation, or will surrender this function to a board of directors or other official or officials. In particular cases the Legislature may see fit to enact that the powers of the corporation shall be vested in its directors: normally their representative character will depend upon usage or the published intent of the corporators as expressed in the articles of association. An instance of the former mode of vesting the corporate powers is afforded by an act of incorporation considered in *Dana* v. *Bank of United States*.[50] This act directed that a board of directors be elected and organized 'for the management of the affairs of the corporation,' and the Court said that 'the president and directors, though elected by the stockholders, derive all their authority from the act or charter.' So, too, in *Bank of U.S.* v. *Dandridge*,[51] Marshall C.J. observed: 'The management and direction of the affairs of the institution are

[50] 5 W. & S. 246.
[51] 12 Wheat. 64.

committed to (the directors) by the express terms of the act of incorporation . . . they alone have the power to manage its concerns and are left without control to exercise their own discretion.' In whatever manner they may have been established as the persons in whom the corporate powers are primarily vested, the directors, or other managing, uncontrolled representatives, are the controlling faculty of the corporation; both in lay acceptance and in law they *are for all practical purposes the corporation.*

Chief Justice Shaw of Massachusetts in *Burrill* v. *President, etc., of the Nahant Bank*,[52] declared: 'By the by-laws of these corporations and by a usage, so general and uniform as to be regarded as a part of the law of the land, [a board of bank directors] have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. We think they do not exercise a delegated authority, in the sense in which the rule applies to agents and attorneys.' Again, in *Maynard* v. *Firemen's Fund Insurance Co.*,[53] Currey C.J. said: 'The directors or dominant body of a corporation is deemed to be the mind and soul of the corporate entity, and what they do as the representative of the corporation, the corporation itself must be deemed to do, and the motives and intentions of the directors, manifested when a material fact in issue, are to be imputed to the corporation itself.' Cf. *Hindman* v. *First National Bank of Louisville*,[54] *per* Taft J.: 'This certificate was made by order of the board of directors. This was the governing body of the bank, and though . . . in a certain sense it is an agency or representative of the bank, it is for all practical purposes the bank.' [55]

When Chief Justice Shaw and Mr. Justice Taft and Chief Justice Currey so defined the function of the directing bodies of corporations they were giving judicial recognition to a very real business truth: business men do in fact habitually think of a company in terms of its directors; of a bank as controlled by its president. They know that the funds, etc., belong to the company and not to its representatives, but as an active unit the company is nothing more than these men acting in their special capacity. The policy of the corporation is the policy which these men formulate: their brains are the brain of the corpora-

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[52] 2 Met. 163, at p. 166.
[53] 34 Calif. 48, at p. 55.
[54] 98 F. 562, at p. 566.
[55] Cf. *Pollard* v. *Vinton*, 105 U.S. 7; *Lake Shore and M. S. Ry. Co.* v. *Prentice*, 147 U.S. 101.

tion as truly as if it were a real organic entity partaking of their substance and acting like a physical body in obedience to the impulses of their brain cells. Business companies, which form to-day by far the most important class of corporations, have individual characters and characteristics which are in great part the characteristics of their directors writ large where he that runs may read. Their business character is the outward manifestation of the commercial ethics of those who control their policy and system: hard heads at the directors' table make for uncompromising enforcement of a company's rights and short shrift for trespassers. Confidence in a company is inspired by the accession to its directing board of a man of proved ability and integrity, and undermined by such a man's withdrawal. A corporation is more than the representatives whom it outlasts, but at any specific moment it is roughly identifiable with them. In their corporate capacity they are the substance upon which the abstraction rests. Furthermore, directors and other controlling officials of corporations wield resources of material as well as intangible strength which are not at the command of private persons. Their vote is able to tunnel mountains and span ravines; to ensure or to jeopardize the lives of many persons. From a decision in the board room of a railway company to accelerate a particular service or to omit the observance of certain precautions, deaths may follow as inevitably as upon a nation's declaration of war, and if the decision is taken in wanton disregard of the foreseeable consequences, it is no less criminal than an agreement between Chicago gunmen to 'work a hold-up' with machine-guns. Indisputably the directors who participate in a decision authorizing the agents of a company to endanger human lives are themselves personally responsible, alike before moral and legal tribunals, and on a given set of facts might be guilty of instigating a murder, or as accessories before the fact. But policy demands that not only they but the corporation shall be responsible. The resources which they manipulate belong to the corporation: not as private men but as the persons in whom the corporate powers are vested are they potential contrivers of holocaust. Men are notoriously prone to mass depravity and will acquiesce at a meeting in the adoption of a policy which singly and in private they would repudiate. Hence, the need for a sanction to compel caution in the selection of directors and the supervision of their policy. A corporation has been said to have no morals, but its members can be induced by an effective sanction to make its outward conduct conform to a

standard, and where they can control its directors public policy demands that they should be responsible in their corporate capacity. This argument has, of course, no application to cases where the directors are autocrats subject to no control, but in scarcely any business company will the directors have power to determine fundamental questions of policy without reference to the body of shareholders, on whom caution may be enjoined by the enforcement of a criminal fine against the corporate funds. It can never be within the authority [56] of directors *vis-à-vis* the corporators, except by a vote of criminal stockholders, to direct a crime, and any seemingly criminal step may be enjoined by a majority of the stockholders lest their interest in the corporate funds suffer through the incurring of a criminal fine. Admittedly, it is impracticable for single shareholders to maintain surveillance upon the directors, but the plan might well be adopted of appointing a trustee for the shareholders' interests whose duty it would be to make known to them any illegitimate action by which the directors might threaten to commit the interests of the corporation. It is a simple matter in drawing up articles of association to make adequate provision for discussion in a shareholders' meeting of any questions which it may be desired to raise, and for controlling the directors by means of special resolutions.

Too much weight has been given in the discussions of public policy in relation to the imposition of corporate liability for crime, to the argument that since the law has prescribed certain definite penalties which are to be incurred only by offenders having guilty knowledge and guilty intent, the innocent members of offending corporations ought not to be amenable to those penalties. They are not in fact subjected to such penalties in their personal but only in their corporate capacity; on the criminal conviction of a corporation no stockholder goes to prison unless he has abetted or otherwise involved himself in the criminal act, no individual pays the fine imposed. The sanction is borne distributively, in the same proportion as the fruits of the illegitimate enterprise have, or might have, been enjoyed. Nor does the penalty fall any harder on shareholders than on the innocent families of convicts who are not corporators.

Prevention is the principal aim of criminal sanction and one effect of imposing a sanction upon the corporation for crimes committed in their corporate capacity by its directors would be to deter such persons from guilty conduct. It may be

[56] It may be within their *capacity* as primary representatives, but that is not here relevant.

idealistic to suggest that in very many cases the representatives of a corporation would shrink from inflicting upon the corporate entity the infamy of a criminal conviction; but directors might well hesitate to expose the goodwill of their business to such notoriety as has overtaken some American corporations in consequence of prosecutions. Corporations which the Courts have found guilty of illegal practices may not know a prison cell or wear the broad arrow, but their goodwill suffers a very definite depreciation. Even a conviction for murder might thus prove salutary as involving the sanction of public disapproval and the possibility of intervention by the Attorney-General. Nor is it too fanciful to suppose that consideration for the good repute of a regiment or police squadron may prove a restraining influence upon its members. The deeds which men do as directors live after them as influences to mould the policies of their successors; they affect the character of the group, as the 'tone' of a school boarding-house is imbued with the personalities of its boys. In an association the ideals of one generation are the tradition of the next. A company which gets a bad name is apt to form bad habits and it is as well that its chain should be shortened in order to lessen its potentiality for harm.

Lawyers are as well aware as laymen that corporations consist of human beings and can act only when a human mind contrives and a human hand executes, nor have they by a pedantic insistence upon the separateness of the legal personality of a corporation, precluded themselves from treating human acts as its acts. Recognizing that ordinarily the mind, where no special call is made upon it for meticulous thought, does not distinguish between the controlling representatives of a company and the corporate body which they represent, the law already treats their acts as for many purposes the acts of the corporation. It attributes their external acts and their accompanying mental states to the corporation and endorses the layman's view that the corporation has participated in them. Certain American Courts have expressly taken this position and have imposed punitive damages on the ground that the corporation itself took part in the wanton wrong and should be made an example to others. Yet what purpose of policy could exemplary damages serve to which a punitive fine would not also prove conducive? The deterrent effect would operate precisely where it is most needed, upon the directors *qua* directors, that is, upon the intelligent-thinking element in the corporation, affecting directly their relation to the corporation and not simply their private interests. There would be a sanction which few would lightly

incur in the loss of personal prestige consequent upon the criminal conviction of a corporation in which one was a director, and in the depreciation in value of the company's stock of which a good share is commonly held by the directors.

Like other legal persons, corporations have a factual as well as a legal existence—they are group entities as well as legal persons—and when they are thought of as acting, as contracting, employing servants, committing torts or crimes, they are pictured under their natural aspect as group organizations of actual human beings. All legal persons are unsubstantial concepts of the intellect: men, *qua* legal persons, are no more tangible than corporations; they *act as men, i.e.* as *natural* persons, and not as legal persons, and it is by operation of law that their acts give rise to consequential rights and liabilities in themselves as legal persons. The concept of a man *qua legal person* and the concept of the same individual *qua natural person* are two facets of his Ego or Individuality. Upon the same natural person, viewed in distinct aspects or capacities, two or more legal persons may be predicated. Acts belong to the realm of facts: legal persons inhabit an intellectual plane and are incapable of action. Already in the law of civil wrongs it is clearly established that liabilities may fall upon a legal person not only for acts factually performed by the human being upon whom that legal person is predicated, or by the specific human beings subsumed in a group unit upon which has been predicated a legal person, but also for the acts of other human beings standing in a certain legal relation to such legal person. It is suggested that *criminal* liability be imposed on those legal persons which are corporations *only for the acts of the human beings who as primary representatives wield the powers of the groups upon which they are predicated*, and it goes without saying that in England liability would be restricted to such acts as were within the contemplated scope of activity of the group unit. For the acts of mere servants and of those members of the group who, having surrendered their immediate control, are not its primary representatives, no criminal liability should fall upon the corporation any more than upon an individual legal person, except in cases where the corporation is under an absolute statutory duty to see that a certain thing is either done or, as the case may be, not done. In such a case, the liability is imposed not because of the factual act of the inferior agent but for the omission of the primary representatives.

Even to-day the gradual process of emancipation of legal

thinking about the nature of corporations has not entirely thrown off all the shackles of Blackstonian anthropomorphism. Intellectual difficulty is still felt in giving corporate significance to certain kinds of acts, and a tendency is still perceptible to regard certain actions as in the nature of things incompatible with the intangible non-physical nature of corporations. Perhaps most incongruous of all seem to be the two crimes of murder and rape; the Blackstonian thinker cannot conceive of a corporation being guilty of either of these; it lacks a guilty mind to harbour malice aforethought and has no body to do violence. Yet it may well be urged that such a company as was the East India Company, having wide powers of government in a distant land and employing soldiers to maintain discipline, might be rendered guilty of either crime by the orders of its directing body that a day of terror be inflicted on a recalcitrant city. The whole history of the legal treatment of corporations illustrates the steady trend away from primitive anthropomorphism to a broad conception of a very wide field of potential corporate responsibility. Public policy demands that corporations be held to a higher degree of responsibility than individuals, in proportion as they are more powerful and equipped materially to work much greater harm.

NOTE.

In the Yale Law Journal for April, 1927,[57] there is an extremely interesting article by Prof. Henry W. Edgerton, of George Washington University Law School, entitled 'Corporate Criminal Responsibility.' In this article Prof. Edgerton has set forth a very able argument in favour of the view here expressed, that corporations should be held to a wide responsibility for crimes committed on their behalf in the course of the corporate enterprise; but a more general liability is there urged than appears consistent with established principles. Prof. Edgerton does not recognize the distinction, which on the reasoning of this article is vital, between crimes committed or directly authorized by the primary representatives of a corporation, and crimes committed by mere inferior servants or agents.

[57] Vol. xxxvi, No. 6, at p. 827.

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NOTES ON RECENT CASES.

BANKRUPTCY — ORDER AND DISPOSITION — REPUTED OWNERSHIP — TRADE CUSTOM—BANKRUPTCY ACT, 1914 (4 & 5 GEO. 5, c. 59, s. 38 (c)).

Re Ford. [1919] 1 Ch. 134, 137. 97 L. J. Ch. 334.

THE bankrupt carried on business in Mayfair, as a dealer in furniture and antiques. Except for the word 'antiques' shown inside the shop window, there was no notice to indicate the nature of the business there carried on.

In the first motion, it appeared that the X Co., Ltd., who carried on business as wholesale dealers in antique furniture, had for some time been sending their goods to the bankrupt on 'approval' or 'sale or return.' No time limit was fixed in the invoices which accompanied delivery of the goods, and the bankrupt was at liberty to sell the goods at any price he chose, his only obligation being to pay the price set against each article in the invoice, unless he returned it. The bankrupt was in the habit of paying lump sums from time to time, on account of goods he sold, and the X Company periodically checked the goods sent, in order to ascertain which of them were sold, and made entries of goods sold in their 'bought ledger.' On November 29, 1927, a receiving order was made against the bankrupt, and about a month later an order of adjudication was made. At the date of the receiving order the bankrupt had in his possession goods priced altogether at more than £2,000, which had been so sent to him on 'sale or return': and those goods were at that time exposed for sale in the bankrupt's shop with other goods of the same class, but with nothing to distinguish the goods of the X Company from the rest.

The trustee moved for a declaration that those goods of the X Company were the property of the bankrupt, divisible amongst the creditors and vested in the bankrupt at the commencement of the bankruptcy within the meaning of section 38 (a) of the Bankruptcy Act, 1914, or by virtue of the reputed ownership clause (section 38 (c)) of the same Act.

Evidence was given by furniture dealers of the existence of a well-known trade custom for such dealers to dispose of goods in accordance with the course of dealing followed by the bankrupt and the X Company.

Held by Clauson J. that the practice adopted between the X Company and the bankrupt showed an intention that the property in the goods should not pass to the bankrupt until sale (Sale of Goods Act, 1893, s. 18); and further, that the evidence proved the existence of a custom for wholesale dealers in antique furniture to send articles of furniture to retail dealers on 'sale or return,' and that such custom is sufficiently notorious to exclude such articles from the doctrine of reputed ownership (section 38 (c), Bankruptcy Act, 1914: *Ex p. Wingfield* (1879), 10 Ch. D. 591).

In the second motion, the following facts appeared. A Mrs. Powell, wishing to sell her antique writing table, in January, 1927, left the table with the bankrupt at his shop, with instructions to sell the same at a minimum price of £100, it being agreed that the bankrupt should be at liberty to retain the surplus of any sale money which he might receive

in excess of that amount. At the date of the receiving order in November, 1927, the table was exposed for sale in company with other articles of furniture in the bankrupt's shop, and there was nothing to distinguish it from such articles.

The trustee moved for a declaration that the table formed part of the property of the bankrupt. On behalf of Mrs. P. evidence was tendered to show that the custom proved in the case noted above was wide enough to embrace goods sent by private customers for sale on commission or otherwise.

Clauson J. held that Mrs. P. had failed to prove the existence of a general trade custom for a retail dealer to hold goods of private customers for sale on commission or otherwise: but he dismissed the motion on another ground, namely, that the existence in the trade of the custom proved in the X Company's case (*supra*), had the effect of preventing the reputation of the bankrupt's ownership from attaching to any of the goods whatever exposed in his shop, and that thus the bankrupt's possession of Mrs. P.'s table was not such as to make the bankrupt reputed owner thereof.

The decision would appear to add a further limitation to the operation of section 38 (c)—the 'reputed ownership clause'—of the Bankruptcy Act, 1914, inasmuch as it is an extension of the rule laid down in *Ex p. Wingfield* (1879) 10 Ch. D. 591. In that case it was held that goods delivered to a bankrupt on 'sale or return' were excepted from the reputed ownership rule where there is a well-known trade custom to deliver goods on such terms. It now appears that, in such circumstances, all similar and undifferentiated goods are exempt from the doctrine of reputed ownership, even where they themselves have come into the bankrupt's possession otherwise than in the course of the notorious trade custom. There would seem to be no good cause why similar reasoning should not apply even where none of the goods have come into the bankrupt's possession in pursuance of such trade custom. The words used by Clauson J. in his judgment seem clearly to indicate that the mere existence of the custom is sufficient to prevent the reputation of ownership from attaching to any trade goods in the bankrupt's possession. Not a single authority is reported as having been cited except the first *Re Ford* (*supra*), but *Re James* (1907) 24 T. L. R. 15 appears to support this. There the Court of Appeal held that, as there is a well-known custom to take in stock for agistment on a farm, the reputed ownership clause is thereby excluded, even though in fact there is no agistment of the stock claimed.

G. T. M.

Bill of Exchange—Banker—Loan by Acceptors' Bank to Acceptors to meet Bill—Bill Indorsed in Blank by Payee—Liability of Acceptors' Bank to Payee—Negligence—Money had and Received—Conversion of Bill—Bills of Exchange Act, 1882, ss. 2, 8, sub-s. 3, s. 34, sub-s. 1, ss. 47, 53, 59.

Auchteroni & Co. v. *Midland Bank, Ltd.* [1928] 2 K. B. 294; 97 L. J. K. B. 625.

The plaintiffs, a partnership firm in Liverpool, sold goods to the N. P. Company, and drew upon the company a bill for £876 9s., payable three

months after date, in payment for the goods. The company accepted the bill payable at the defendant bank in Liverpool. Shortly before the bill became payable the company, whose account at the defendant bank was overdrawn, asked the bank to order payment of the bill and to charge the amount of the bill to their account. The defendant bank were willing to act on this advice, as the sum was within the limits of the running overdraft which they had agreed to allow to the company. When the bill was due it was brought by W, the plaintiffs' cashier, to a partner of the firm, who at W's request indorsed the bill in blank. W, instead of taking the bill to the plaintiffs' bank to be collected through the Clearing House, presented the bill for payment over the counter at the defendant bank and received the money, which he then fraudulently converted and stole. The plaintiffs sought to recover from the defendant bank the amount of the bill. Their claim was based on three grounds, on all of which Wright J. decided against them.

(1) Negligence on the part of the defendant bank. But in order to establish a claim based on negligence it must be shown that the defendant was under a duty to the plaintiff to take care. In such a case as the present such a duty could arise only from privity of contract, which does not exist between the holder of a bill and the acceptor. 'It is enough,' said Wright J. (at p. 298), 'to contrast *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, where it was held that the acceptor of a bill of exchange owed to the actual holder no duty to be careful that the bill should not be drawn so as to enable it to be fraudulently altered, because there was no privity of contract between them, with *London Joint Stock Bank* v. *Macmillan and Arthur* [1918] A. C. 777, where such a duty was held to exist between the drawer of a cheque and the drawee bank by reason of the fact that privity of contract existed between those parties, that is as between banker and customer.'

(2) Money had and received by the bank on the plaintiffs' account. 'This kind of equitable action,' said Lord Mansfield in *Moses* v. *Macferlan* (1760) 2 Burr. 1005, 1012, 'to recover back money, which ought not in justice to be kept . . . lies only for money which, *ex aequo et bono*, the defendant ought to refund,' for example, money paid under mistake of fact. But in the present case the money never was had and received by the defendant bank on the plaintiffs' account. By section 53 of the Bills of Exchange Act the drawing of a bill does not in England amount to an assignment in favour of the payee of the funds of the drawee—still less of funds in the hands of the drawee's bank. Further, the acceptors' account at the bank was overdrawn, and even if they did provide funds the money was provided to pay off the further loan which the bank had agreed to make in order to meet the bill.

(3) Conversion of the bill as a chattel by the bank. It was argued that, after paying W., the bank exercised a dominion over the bill adverse to the plaintiffs, for they held it subject to their lien as against the acceptors for the amount they had lent upon it, whereas the plaintiffs did not intend to part with the bill except upon receipt of payment. This would be conversion, on the principle stated by Lord Chelmsford in *Hollins* v. *Fowler* (1875) L. R. 7 H. L. at p. 795: 'Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person, is guilty of a conversion.' To this

it was replied that the bill was a negotiable instrument, it bore the genuine indorsement of the payee, and being indorsed in blank became payable to bearer. By section 2 of the Act 'bearer' means the person in possession of the bill, that is to say, W., to whom the bank paid the bill. In these circumstances, while it was true that the bill was discharged by payment and the bank did not become holders for value under section 27, the bank were entitled to rely on the fact that they paid the bill in good faith and without notice of any defect of title. The plaintiffs indeed contended that presentation of such a bill over the counter was so unusual as to put the bank on inquiry. The evidence showed that it was the almost universal custom in Liverpool to present trade bills for payment through the Clearing House, but that presentation over the counter, though unusual, was not irregular. 'The crucial consideration here is that the defendant bank had presented to them for payment a bill of exchange, complete and regular on its face, and indorsed in blank by what the cashier knew to be the plaintiffs' genuine indorsement' (Wright J. at p. 303). In spite of the fact that presentation over the counter was unusual, it was due presentation recognized by the law merchant as sufficient to require the bankers to pay, and the learned judge held that in the circumstances there was nothing to excite the suspicion that there was something wrong in the transaction, and that therefore the bank could not be said to be acting otherwise than in good faith.

The decision recognizes and follows the rule laid down by Lord Selborne and Lord Macnaghten in *Bank of England* v. *Vagliano Brothers* [1891] A. C. 107, 127, 157. 'A banker must pay offhand and as a matter of course bills presented for payment, duly accepted and regular and complete on the face of them; and as a general rule this doctrine would appear to apply with equal force to cheques presented for payment' (Paget's Law of Banking (3rd ed.), p. 212). The tendency of banking practice has been to require an increasing measure of strictness on the part of bankers in paying bills, but the present case goes no further than the older authorities allow.

P. M. W.

Bill of Exchange—Alteration of Date of Bill—Apparent Alteration—Test to be Applied—Bills of Exchange Act, 1882, s. 64.

Woollatt v. *Stanley and others.* (1928) 138 L. T. 620.

The plaintiff W and the defendant D were co-trustees of a trust fund settled by one S upon his wife and himself. S being financially embarrassed, advances were made to him out of the trust fund by W and D, but W protested against this course, and S and D thereupon sought to raise money by means of a bill of exchange. On September 7 a bill for £200 payable three months after date was drawn by D on S and accepted by S. The same day the bill was indorsed by B as an accommodation party, and likewise by A on September 8. D the drawer, and S the acceptor, together attempted to get the bill discounted, but in this they failed. Before September 30 the drawer D altered the date of the bill at the request of S the acceptor, by inserting the figure 1 before the figure 7, and the figure 1 was at a later date, but still before September 30, altered into the figure 2. On September 30 a meeting took place between W, D, and S, at which

the plaintiff W consented to a further loan of £197 from the trust fund if the bill were delivered to him to keep until maturity, when it was to be presented for payment in the ordinary way. On presentation the bill was dishonoured, and the plaintiff W sued the acceptor S, the drawer D, and the accommodation indorsers B and A. The acceptor S did not contest the action. The drawer D contended that at the interview on September 30 it had been agreed that the plaintiff W should hold the bill merely as security for the advance of £197, and that it should not be negotiated at all, but the Judge found as a fact that no such agreement had taken place. The accommodation indorsers B and A relied (*inter alia*) on the alteration of the date of the bill.

B and A being accommodation parties and therefore *prima facie* liable under the Bills of Exchange Act, 1882, s. 28, and the plaintiff being a holder in due course under section 29, and so entitled to all the powers of such a holder in case the indorsements are obtained by fraud, it was held by Salter J. that, but for the question of alteration, the plaintiff W would be entitled to judgment against D, B, and A.

Section 64 first enacts the common law rule: 'Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers.' Here the drawer D, having made the alteration, was therefore liable. A proviso is then added in the Act in order to mitigate the severity of the former rule: 'Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenour.' The effect of this proviso is stated by Lopes L.J. in *Scholfield* v. *Londesborough* [1895] 1 Q. B. (at p. 552): 'Before the Act a material alteration was a complete defence, by whomsoever made, and avoided and discharged the bill, except as against a party who made or who assented to the alteration. Now, under the proviso to section 64, a holder for value may, when a bill has been materially altered, but the alteration is not apparent, avail himself of the bill as if it had not been altered.'

The alteration in the present case being material, it merely remained to decide, was the alteration apparent? The only English authority as to the test to be applied was *Leeds Bank* v. *Walker* (1883) 11 Q. B. D. 84, where Denman J. said (at p. 90): 'By the word "apparent" I do not think it is meant that the holder only should not have had the means of detecting the alteration. If the party sought to be made liable can at once discern by some incongruity on the face of the note and point out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an "apparent" one, even if it is not an obvious one to all mankind.' But doubts have constantly been cast upon the soundness of this rule. 'This view appears . . . to be inconsistent with the decision in *Scholfield* v. *Londesborough* [1896] A. C. 514, and, it is submitted, is incorrect, the true test being, it is further submitted, that an alteration is not "apparent" if it cannot be detected without any intervention on the part of any person liable on the instrument, by the holder': Byles on Bills (18th ed.), p. 284. In *Bank of Montreal* v. *Exhibit and Trading Co.* (1906) 11 Com. Cas. 250, it was held after inspection by the Court that the addition of the word 'Ltd.' to the name of the payee was not

apparent. 'Looking at the note, I am at present inclined to agree . . . that the alteration is not "apparent." The ink may be a little thicker in the added word "Ltd." but there was room for its insertion' (Phillimore J. at p. 252). In *Brown* v. *Bennett* (1891) 9 New Zealand L. R. 487, the jury found that but for the plaintiff's want of care he would have discovered the fact that alterations had been made in a bill which he was taking: it was held that in the circumstances this was equivalent to a finding that the alterations were apparent. In *Cunnington* v. *Peterson* (1898) 29 Ontario R. 346, and *Maxon* v. *Irwin* (1908) 15 Ontario L. R. 81, Denman J.'s rule was expressly dissented from. Cf. also *Black* v. *Collin* (1917) 28 Manitoba R. 179, and *Gagnier* v. *Leblanc* (1921) 32 Quebec B. R. 495.

In the present case Salter J. substituted the following test for that of Denman J.: 'Is the alteration of such a kind that it would be observed and noticed by the intending holder when he scrutinizes the document which he is contemplating taking and examines it as a negotiable instrument? . . . If the intending holder on scrutinizing the document with reasonable care, would observe that it has been altered, then that constitutes an apparent alteration' (at p. 622). According to this test the alteration of the date of the bill was most apparent, and the holder W could not enforce the bill against the accommodation indorsers B and A, but only against D the drawer.

It is submitted that this decision is sound in principle and likely to prove beneficial in practice. The test laid down by Salter J. embodies the standard of care not of the party who may have special knowledge of, and familiarity with, the bill, but of the ordinary man who takes the bill in the normal course of business and of whom no more than a reasonable degree of care is required. Whether such a measure of care has been exercised is a question which a jury after examination of the instrument may without difficulty determine.

P. M. W.

Bills of Exchange Act, 1882, s. 82—Principal and Agent—Authority to Draw Cheques—Fraudulent Exercise of Authority—Banker—Crossed Cheque—Receiving Payment for a Customer—Negligence—Conversion—Set-off—Ratification—Estoppel.

Lloyds Bank, Ltd. v. *The Chartered Bank of India, Australia and China.* [1929] 1 K. B. 40. 97 L. J. K. B. 609.

The plaintiffs were bankers having a branch office in Bombay. L, their chief accountant at that branch, had express authority to draw cheques on other bankers with whom the plaintiffs had an account. In 1922 he began fraudulently drawing cheques on the plaintiffs' bankers in favour of the defendants, to whom he sent written instructions to place the cheques to the credit of his own account with them. When these cheques had to be countersigned he obtained the second signature by misrepresenting the purpose for which the cheques were drawn. He concealed these frauds for two years by means of false entries in the books of the plaintiffs' Bombay Branch. When each of these fraudulent cheques, nineteen in number, had been cleared and the amounts credited to his account by the

defendants, he immediately drew cheques against the balance standing to his credit. Of these last-mentioned cheques, some were in favour of stockbrokers with whom he had speculative dealings; others he paid to the plaintiffs, either to the credit of his current account with them or in respect of special services to be rendered by them.

It was held on these facts by the Court of Appeal that the defendants had converted the cheques. In this the Court followed *Morrison* v. *London County and Westminster Bank* [1914] 3 K. B. 356, and *A. L. Underwood Ltd.* v. *Bank of Liverpool and Martins* [1924] 1 K. B. 775. It was admitted that L had actual authority to sign the cheques. 'But,' said Sankey L.J. (at p. 69), 'he had no authority to send the cheque with the private memorandum above referred to requesting the defendants to put it in his joint account, and in doing so he was guilty of conversion and so were the defendants who carried out his instructions. As Lord Ellenborough C.J. said in *M'Combie* v. *Davies* (1805) 6 East, 538, 540: "A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it: for what is that but assisting that other in carrying his wrongful act into effect?"'

The defendants then fell back on the Indian Negotiable Instruments Act, which in effect reproduces section 82 of the Bills of Exchange Act, 1882. The latter provides that: 'Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.' This section is amended by section 1 of the Bills of Exchange (Crossed Cheques) Act, 1906, which reads: 'A banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.'

It was held that the defendants could not rely on this section because they were guilty of negligence in making no inquiry when they were put on inquiry by the following facts:—

1. Large sums of money were being transferred to them without any apparent cause.

2. This was being done by cheques signed by one who to their knowledge was an officer of the plaintiffs.

3. These cheques were drawn, not upon any banking account of the person signing, but on an account which the plaintiffs had with another bank.

4. The person who signed the cheques, the person who gave the directions as to how they should be applied, and the person to whose credit the defendants were directed to place them were one and the same person.

5. As soon as the cheques were credited as directed large sums were drawn against them by this person in favour of payees whom the defendants knew to be stockbrokers.

In the words of Scrutton L.J. 'A subordinate official of a bank is steadily paying cheques of a bank by which he is employed, made payable to the collecting bank, into his own account at that collecting bank' (pp. 56—57). The whole transaction was on the face of it irregular and the defendant bank was put on inquiry: *A. L. Underwood Ltd.* v. *Bank of Liverpool and Martins* [1924] 1 K. B. 775.

In *Morrison* v. *London County and Westminster Bank Ltd.* [1914] 3 K. B. 356 the defendants successfully raised the defence that they had been 'lulled to sleep' by the failure of the plaintiff to take any action after the frauds had been in existence for two or three years. It was held in this case that there was no estoppel because the defendant bank was not lulled to sleep by the failure of the plaintiffs to discover the fraud. There was no evidence to show that the defendant bank had been misled thereby. Furthermore, Scrutton L.J. doubted the correctness of the decision in *Morrison's Case.* 'It does not seem consistent with the decisions in *Bank of Ireland* v. *Evans' Trustees* (1855) 5 H. L. C. 389, and *Swan* v. *North British Australasian Co.* (1863) 2 H. & C. 175, that in order to act as an estoppel negligence must be the proximate cause of the loss' (p. 60).

Of course there cannot be negligence without a corresponding duty of care. The Bills of Exchange Act, s. 82, leaves the duty of the banker to be inferred. Sankey L.J. accepts the view of Sir John Paget on Banking (4th ed.), p. 274: 'I think the duty of the defendants to the true owner of the cheque was (1) to exercise the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own, and (2) to provide a reasonable and competent staff to carry out this duty' (p. 69).

The ruling of Scrutton and Sankey L.JJ. (at pp. 59, 72) as to what constitutes negligence by a collecting banker is to be noted. They accepted the measure of duty stated by Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* [1920] A. C. 683, 688, where he remarks: 'Mr. Justice Isaacs says, "Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morrison* v. *London County and Westminster Bank* (*supra*) and relevant to the present, are (1) that the question should in strictness be determined separately with regard to each cheque; (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry." If there be inserted after the words "given cheque" the words "coupled with the circumstances antecedent and present," their lordships think this is an accurate statement of the law.' To require a thorough inquiry into the history of each cheque would render banking business impracticable, therefore there must be something markedly irregular in the transaction.

This case brings in one new point. The fact that the cheques collected by the defendant bank were made payable to the defendant bank did not deprive them of the protection of section 82 of the Bills of Exchange Act, 1882. It has been thought that in such circumstances bankers were not collecting for a customer, but this case decides that they were doing so. The Court in coming to this conclusion was guided by the decision in *Morrison* v. *London County and Westminster Bank* [1914] 3 K. B. 356, where one of the cheques converted was drawn to the order of the collecting bank.

It was laid down in *Hiort* v. *London & North Western Ry. Co.* (1879) 4 Ex. D. 188, and in *Bannatyne* v. *MacIver* [1906] 1 K. B. 103, that where the defendant in an action for conversion is able to prove that the plaintiff has got back part of the proceeds of the property wrongfully

converted, he is *pro tanto* excused. It was attempted to apply this principle in this case because L had paid some of the money gained by his conversion into his account at the plaintiff's bank. However, L had used the money to discharge his own debts to Lloyds Bank or to create the relation of banker and customer between them so as to enable him to draw, as he did in fact draw, for further sums upon them. The plaintiffs had given value for the money, and could not be said to have received back the proceeds of the conversion, for to say so would have inflicted a double penalty on them.

J. R. R.

CONSTITUTIONAL LAW—HABEAS CORPUS—SUCCESSIVE APPLICATIONS TO DIFFERENT JUDGES.

Eshugbayi Eleko v. *Officer Administering the Government of Nigeria.* [1928] A. C. 459. 97 L. J. P. C. 97.

A MOTION by the appellant, in the Supreme Court of Nigeria, for the issue a writ of *habeas corpus* was dismissed by the acting Chief Justice, who, after a full consideration of the facts, was of the opinion that the appellant's detention was lawful. The appellant gave fresh notice of motion in the Supreme Court to the same effect. This motion was dismissed on the ground of a preliminary objection by the Attorney-General that a similar application based on the same material had been made by the appellant and had been dismissed by the Acting Chief Justice; in view of that refusal the application could not be entertained.

Appeal was carried to the full Court, but was dismissed, the Court agreeing that an application on the same grounds having been refused by a judge of the Supreme Court, no other judge of that Court had jurisdiction to entertain the application.

The appeal was carried to the Judicial Committee of the Privy Council.

It must be observed that the law in Nigeria with regard to the issue of writs of *habeas corpus* is the same as the law in England.

It was contended on behalf of the appellant that it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of *habeas corpus*, and that each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even if the grounds urged are exactly the same. For the respondent, the right to make successive applications was admitted, but it was argued that they must be to different Courts, and not merely to different judges of the same Court; and in support of this counsel cited Lord Esher in *Ex p. Cox* (1887) 20 Q. B. D. 1, 13: 'It is not correct to say that under the old system [before the Judicature Act, 1873] there could be an application to all the judges in succession. There could be an application to all the Court in succession.' Counsel argued that, although the decision of the Court of Appeal in this case had been overruled in the House of Lords (*Cox* v. *Hakes* (1890) 15 App. Cas. 506), none of the learned lords had dissented from Lord Esher's statement of the law.

The Judicial Committee, in allowing the appeal, examined the history of the writ. The Habeas Corpus Act, 1679, they pointed out, provides

that the Lord Chancellor or any one of His Majesty's justices may grant a *habeas corpus* in vacation, and imposes heavy penalties upon any judge who wrongfully refuses to entertain the application. Under this statute application could be successively made in vacation to different judges of the same Court. Thus a curious state of affairs would result from the contention of Lord Esher, quoted above: an application in vacation could be renewed to each judge of the same Court; but in term time application could be made once only to the Court of Chancery, and once only to each of the three Courts of common law. A more serious result of the same argument would ensue from the passing of the Judicature Act, 1873. This statute combined into one Court the old Court of Chancery and the three Courts of common law, whence it would follow from Lord Esher's statement of the law that application for a writ of *habeas corpus* could be made to the Supreme Court of Judicature once only. The Judicial Committee pointed out that the question involved was one of grave constitutional importance, that the writ of *habeas corpus* is a high prerogative writ for the protection of the liberty of the subject, that it would be a startling result if a statute enacted primarily for the simplification of procedure should have materially cut down that protection, and that indeed it could not be held that the Judicature Act had such a result.

Their lordships agreed that there was no reported case before 1873 of application being made to successive judges of the same Court, but they observed that the common law Courts usually sat *in banco*, so that an application to the Court was in effect an application to all the judges of the Court. Moreover, there was a precedent for an application being made to a judge of the Court of Exchequer sitting in chambers, and a subsequent application to the Court of Exchequer, in *Ex p. Partington* (1845) 13 M. & W. 679, 683, where Parke B. says: 'This case has already been before the Court of Queen's Bench, on the return of a *habeas corpus*, and before my Lord Chief Baron at chambers, on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every Court as to the propriety of his punishment, and therefore we have thought it proper to examine attentively the provisions of the statute, without considering ourselves as concluded by these decisions.'

The Court held, therefore, that successive applications are permissible, whether in term time or in vacation, and that such is the law with respect to the High Court of Justice here just as much as in the Supreme Court of Nigeria.

E. M. T.
S. W. H.

CONTRACT—FRUSTRATION—LEADING ACTOR OF A COMPANY—AGREEMENT FOR PROVISION OF A SUBSTITUTE IN CASE OF NON-APPEARANCE OF A PRINCIPAL—IMPOSSIBILITY OF APPEARING.

Terry v. *Variety Theatres Controlling Co., Ltd.* (1928) 44 T. L. R. 242, 451.

THE plaintiff, a well-known actor, made with the defendants an agreement by which the plaintiff was to find a company, described as

consisting of himself and a full company, and appear as principal in a play, and, in the event of the non-appearance of a principal, the plaintiff was to provide a deputy to the satisfaction of the defendants. The plaintiff some days before the commencement of the play became too ill to appear, but a substitute was provided whose capabilities as an understudy were established by evidence. The defendants, however, rescinded the contract, alleging that as the plaintiff could not appear the basis of the contract was gone.

The question at issue was, in the words of Rowlatt J., whether the contract disappeared because Mr. Terry could not appear, *i.e.*, whether the defendants were entitled to treat the case as one of essential frustration, on a failure of the purpose with which the contract was made. Rowlatt J. admitted that the words 'Fred Terry and full company,' inserted in the contract, did show that the parties might have contemplated that the non-appearance of Mr. Terry might not have terminated the contract. He (Rowlatt J.) thought, however, that the defendants were right in not being satisfied by a company which, described as 'Fred Terry and Company,' did not include Mr. Terry. But the Court of Appeal reversed Rowlatt J. Scrutton L.J. (whose judgment is the only one reported) held that the plaintiff's illness was a matter for which the parties had provided, and that he (the plaintiff) was a 'principal' within the meaning of the clause about non-appearance.

This case is interesting as showing the widely differing interpretations which may be placed upon an apparently simple agreement, and the difficulty of applying a well-established legal principle, such as that of the essential frustration of a contract, to the facts of a particular case. The principle of frustration is: is a *rebus sic stantibus* clause to be implied from the terms of an apparently absolute contract? If the parties had foreseen such a state of affairs as subsequently arose, would they have intended the contract to stand? In the leading case on the subject, *Taylor* v. *Caldwell* (1863) 3 B. & S. 826, 839, Blackburn J. said: 'The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.' But it is necessary before the Court can imply such a condition that the contract should be such that 'performance depends on the continued existence of a given person or thing,' for as A. T. Lawrence J. said in the *Scottish Navigation Co.'s Case* [1917] 1 K. B. 222, at p. 249: 'No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.' Lord Parker in *Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Products Co. Ltd.* [1916] 2 A. C. 397, at p. 422, elaborated the same point: 'This principle is one of contract law, depending on some term or condition to be implied in the contract itself, and not on something entirely *dehors* the contract, which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions.'

The principle is comparatively simple, and is not open to doubt. The difficulty arises in its application. When a decision is so largely the outcome of personal opinion, one is more hasty to criticize it than would

otherwise be the case. Though one may think that the defendants in the present case would not at all events have drafted the agreement as they did had they foreseen the eventuality of the plaintiff being unable to appear at all, one must not forget that the intention of the parties has to be gathered from the provisions of the contract as it stands, and that inferences as to the probable state of mind of the parties at the time of entering into the contract are relevant only in so far as they help the Court to interpret those provisions.

D. W. D.

CONTRACT—GAMING—GAMING ACT, 1845, S. 18—ENTRY OF HORSE FOR A RACE.

Ellesmere v. *Wallace.* (1928) 44 T. L. R. 798. (1929) 45 T. L. R. 238.

THIS was a friendly action brought in effect by the Jockey Club against the defendant to determine the application of section 18 of the Gaming Act, 1845, to a contract to pay entrance money and forfeits for a horse race. That section runs: 'All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made'; but then adds the proviso 'that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise.'

The facts, taken from the judgment of Clauson J., were as follow:— The defendant nominated a horse for two races at the Newmarket First Spring Meeting, 1928, namely, the Peel Handicap, a sweepstake of five sovereigns each, of which two sovereigns were to be forfeit in the event of the horse not running, with 200 sovereigns (added by the Club, as a prize, to the entrance fees), fifteen entries, or the race to be at the option of the Stewards; and a Long Course Selling Plate of 200 sovereigns, entrance two sovereigns, ten entries, or the race to be at the option of the Stewards, the winner to be sold by auction for 300 sovereigns. When the time for the race came, the defendant's horse did not run. The defendant did not pay any part of the entrance fee for either race. The plaintiffs claimed two sovereigns in respect of the nomination for the Peel Handicap, being the portion of the fee made forfeitable; and two sovereigns in respect of the nomination for the Long Course Selling Plate, being the total entrance fee.

It is clear that, apart from the provisions of the Gaming Act, 1845, there was a perfectly good contract between the parties, and the real question before the Court was the effect of the proviso in section 18 (*supra*). In *Diggle* v. *Higgs* (1877) 2 Ex. D. 422, followed by the Privy Council in *Trimble* v. *Hill* (1879) 5 App. Cas. 342, it was decided that the proviso applied only to such subscriptions as are not due under contracts by way of gaming or wagering. A wagering contract is defined by Hawkins J., in *Carlill* v. *Carbolic Smoke Ball Co.* [1892] 2 Q. B. 484 (at p. 490), as

'one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him a sum of money or other stake; neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties.'

Following these authorities, Clauson J. held that the contract between the defendant and the Jockey Club was a contract by way of gaming or wagering, the Jockey Club betting the prize offered by them to the winner against the defendant's entrance fee and forfeits.

On appeal, however, the Court of Appeal (Lord Hanworth M.R. and Russell L.J.—Lawrence L.J. dissenting as to the Peel Handicap) reversed this judgment, and held that (a) the defendant received other considerations (*e.g.* the right to run his horse at all) besides the possibility of winning a prize in return for his entrance money; and therefore that as (b) the Jockey Club could not 'lose' as a result of the race, this transaction did not fall within the last part of the definition of a wager laid down by Hawkins J. (*supra*). The £200 prize was to be lost by the Club in any event, unless indeed the races were not run at all. Lawrence L.J. regarded the Peel Handicap as a wager on the ground that it was a sweepstake.

It would appear, therefore, that, subject to a revision of these cases by the House of Lords, *bona fide* subscriptions towards prizes in a competition even by the competitors themselves, are not in the nature of stakes for a wager, but that if, as in *Diggle* v. *Higgs* (*supra*), the Court is of opinion that the true nature of the transaction is a veiled wager between the competitors, the contract is void, and is not within the protection afforded by the proviso in section 18, Gaming Act, 1845 (*supra*).

E. G. M.

CONTRACT — INSURANCE (LIFE) — PROPOSAL — ACCEPTANCE — INTERVENING ILLNESS OF ASSURED—NON-DISCLOSURE.

Looker v. *Law Union and Rock Insurance Co., Ltd.* [1928] 1 K. B. 554. 97 L. J. K. B. 323.

IN a proposal to an insurance company for an insurance on his life, L. stated that he was free from disease or ailment, and declared that the particulars in the proposal were true, and that the proposal and declaration should be the basis of the contract. The insurance company wrote to L. stating that the proposal was accepted, and that if his health remained meanwhile unaffected, the policy would be issued on payment of the first premium, and that the risk would not commence until receipt of the first premium. Five days after receiving that letter L. became ill, two days later his illness was diagnosed as pneumonia, and four days later he died of that disease, no notice of his illness having been given to the company. The day before L.'s death the company received by post a cheque which had been signed by him three days before for the first premium, and they sent him a certificate stating that the proposal had been accepted, and that a policy would be delivered in due course. Owing

to the insufficiency of L.'s bank account, the cheque was not honoured. In an action by L.'s representatives against the insurance company for payment of the insurance money or, in the alternative, for delivery of a policy, it was held by Acton J. that the plaintiffs could not recover.

The learned judge took two main grounds for his decision: (1) There is an implied condition in contracts of life insurance that if the risk is materially increased between the time of making the proposal and the time of its acceptance, and that risk is not communicated to the insurers, the contract is vitiated by non-fulfilment of a condition going to its root. But it is somewhat doubtful whether this was Acton J.'s meaning; more probably he meant that there was, in such circumstances, no contract at all because the increase of risk turned the alleged 'acceptance' of the insurers into a mere counter-offer (see *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727, especially Lindley L.J. at pp. 732—733). But whichever of these views he took, he said that the position of the insurers was strengthened by their express intimation to the proposer that their acceptance would be subject to the unaltered good health of the proposer. (2) That insurance, being a contract *uberrimae fidei*, required full disclosure on the part of the insured of any material fact. Once again the insurers were in an even stronger position because of the express condition which they had inserted.

Acton J. also pointed out that the cheque for the premium had been signed by L. before pneumonia was diagnosed, and had been delayed without his knowledge, and, when posted, was posted without L.'s authority or knowledge. This discovery resulted in counsel for the company amending his pleadings. But it is submitted that it was immaterial, for it merely reduced the non-disclosure from fraud to innocent misrepresentation. However, the judgment was in no way based upon it in the end. It may also be urged that the so-called 'acceptance' posted the day before L.'s death would have been outside and posterior to the contract, had there actually been a contract. If there had been a contract it would have been concluded immediately the cheque was posted: but the cheque was in fact bad, and so did not amount to payment, and there was no contract. The receipt given for the cheque was not conclusive against the company. It was open to them to show that the cheque was bad. There was no indication of delay in presenting the cheque, nor if there had been delay was there any indication that it was dishonoured because L. was already dead, or that it would have been honoured if presented in his lifetime.

J. H. B.

CONTRACT—INSURANCE (LIFE)—CONDITION AGAINST SUICIDE—EXCEPTION OF BONA FIDE INTERESTS IN THIRD PARTIES.

Royal London Mutual Insurance Society, Ltd. v. *Barrett.* [1928] Ch. 411. 97 L. J. Ch. 177.

AN assurance company issued a policy containing a condition of which the relevant parts were as follow:—'5. Suicides, etc. The policy shall be void if the life assured dies by suicide or by the hands of justice . . . the policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration . . .' The company advanced money to the assured on a mortgage of certain leasehold property,

and on an assignment to them of the policy by way of security. It was provided by a clause in the mortgage deed that the company should satisfy themselves primarily out of the policy moneys. The assured committed suicide, and the company commenced an action against his executrix for the purpose of enforcing their security. Held, by Tomlin J., that, upon the true construction of clause 5, the expression 'third parties' did not include the assurer; that the policy was void; and that the company was, therefore, entitled to proceed to enforce the security against the leasehold property.

This case turned on the contention of the defendants that when parties under the contract acquire a different status from that which they had under the contract they are 'third parties' within the meaning of the policy, a distinction thus being set up between 'persons' and 'parties.' The defendants relied on *White* v. *British Empire Mutual Life Assurance Co.* (1868) L. R. 7 Eq. 394, in which the facts were substantially the same except that the words 'other person or persons' took the place of 'third parties' in the present case. In *White's Case*, Malins V.-C. interpreted 'other person or persons' as meaning 'other' with reference to the assured, and held therefore that the phrase was wide enough to include the assurer. But Tomlin J. distinguished that case from the present one and interpreted 'third parties' as having reference both to the assured and to the assurer, *i.e.*, that anyone could be a 'third party' except these. At p. 419 he says: 'The case (*White's*) stands as no authority for a clause containing different language.' It is submitted, however, that at least as regards the learned judge's own argument of the ordinary meaning of words, *White's Case* (correct or incorrect) is a very strong authority against his decision. For in that case (a) a more limited expression, 'third *persons*,' was used; and yet it was held to include the assurer; (b) the policy was issued apparently for the very purpose of securing the loan of £1,000 by the company, and yet Malins V.-C. said: 'The moment they (the company) agreed to take the deposit they came within the condition that the policy, to the extent of their interest, should be binding' (p. 397). So that, although they must have known when issuing it that they would be assignees of the policy and nevertheless used the words 'other person or persons,' they must be taken to have meant it to include themselves.

But Tomlin J.'s decision is so eminently reasonable that it seems hard to consider the decision in *White's Case* correct. However, the learned judge managed to his own satisfaction to distinguish *White's Case*. So that if, as has been suggested, the distinction is not real, there now are two authorities for conflicting propositions. That the interpretation put on the 'exception' by Tomlin J. is correct seems almost certain: the object of the exception was to prevent hardship to assignees who acquired a *bona fide* interest for value, and in the present case the application of the exception would have precisely the opposite effect: it would inflict hardship by depriving the company of the benefit of the whole suicide clause. As Tomlin J. said, insurance companies have obviously been for a long time trying to exclude themselves from the exception to the suicide clause, and at last they have succeeded, though, it is suggested, more by good fortune than good management, since the actual language used was less capable of having that effect than that used in *White's Case*.

J. H. B.

CONTRACT—RESTRAINT OF TRADE—PENALTY OR LIQUIDATED DAMAGES.

English Hop Growers, Ltd. v. *Dering.* [1928] 2 K. B. 174.
97 L. J. K. B. 174.

To avoid fluctuations in the price of hops, hop growers formed an association, plaintiffs in this action, to organize the sale of hops through the sole agency of the plaintiffs. Defendant, a member of the association, undertook to deliver to plaintiffs all hops produced by him in 1926 on certain land comprising sixty-three acres. If he disposed of the hops otherwise than through the plaintiffs, defendant undertook to pay plaintiffs as liquidated damages £100 per acre or proportionately on a less acreage.

Before the hops were picked, but when they would have been pickable, if circumstances had been urgent, defendant leased the land to the X Company to be used for hop gardens only. As the hops were not delivered to plaintiffs, they claimed to recover £6,300 as liquidated damages.

Defendant set up three defences.

(1) There was no breach of the agreement. The Court of Appeal held that, as the hops were in a pickable condition, they had been produced by the defendant, and that disposal of them to anyone other than plaintiffs was a breach of the agreement. They considered that Rowlatt J. was wrong in holding that if the defendant grew hops he was under no obligation to pick them, and that the defendant's disposal of the land was not disposal of the hops growing upon it. The Court of Appeal pointed out that Rowlatt J. was wrong in his view that hops are not hops till they are severed from the land.

(2) The agreement was unenforceable as being in undue restraint of trade. The Court first reaffirmed the distinction drawn in many recent cases (*e.g. North Western Salt Co.* v. *Electrolytic Alkali Co.* [1914] A. C. 461, 471, and *Attwood* v. *Lamont* [1920] 3 K. B. 571) between the covenants of persons in an equal position of bargaining and covenants where there is no such equality. *Per* Scrutton L.J. (p. 180): 'It is now well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining.' Given an agreement of either type, the Courts, in effecting a compromise between the conflicting claims of freedom of contract and of modern trade, will apply the tests given by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535, 565, *viz.*, Is the agreement reasonable in the interests of (a) the public, and (b) the parties? The Court was satisfied that this agreement was reasonable from both points of view. Scrutton L.J. said (p. 181): 'In view of the fluctuating character of the yearly supply of hops, I see nothing unreasonable in hop growers combining to secure a steady and profitable price, by eliminating competition amongst themselves, and putting the marketing in the hands of one agent . . . the benefit and loss being divided amongst the members.' Once the Court was satisfied that the objects of the association were reasonable, it was not inclined to inquire in detail whether the machinery for effecting those objects was reasonable in the interests of the defendant. For example, the Court never referred, in giving judgment, to the questions: Does the

agreement refer to defendant's whole trade? What facilities are provided for withdrawing from the agreement? Is the association obliged to accept all the hops grown by the defendant?

In this the Court adopted a different attitude from that of the Court of Appeal in *Joseph Evans & Co. Ltd.* v. *Heathcote* [1918] 1 K. B. 418 (which case, incidentally, was not here referred to—probably because there statute had altered the common law rule), where a similar association was formed, but where the Court held that the agreement imposed was unreasonable as providing for 'a state of things which might result in the shutting down altogether of the plaintiffs' manufacture of cased tubes.'

The *Hop Growers' Case*, therefore, seems to support the proposition that where A agrees with B to be bound by an agreement for maintaining prices imposed primarily for their mutual benefit, the Court will not be astute to assist A to escape from that agreement, provided that it is not contrary to the interests of the public. It is interesting to compare *Palmolive Co. (of England)* v. *Freedman* [1928] Ch. 264 (noted *infra*), where the restraint was imposed primarily for the benefit of one contracting party only.

(3) The sum claimed was a penalty and not liquidated damages. The Court applied the rules summed up by Lord Dunedin in *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* [1915] A. C. 79, 86. Where breach of a contract between parties on equal terms may occasion serious damage, but damage difficult to value exactly, the Court will regard a 'genuine covenanted pre-estimate of damage' as liquidated damages and not as a penalty. It was held that the conduct of the defendant in withdrawing his crops from the common pool and selling them independently would so disturb the delicate operation of maintaining an artificial price that the plaintiffs would suffer serious damage of a kind difficult to value exactly.

All three defences, therefore, failed, and judgment was given for the plaintiffs.

D. H. W. H.

CONTRACT — RESTRAINT OF TRADE — PRICE MAINTENANCE AGREEMENT — PROPRIETARY ARTICLE.

Palmolive Company (of England), Ltd. v. *Freedman.* [1928] Ch. 264. 97 L. J. Ch. 40.

DEFENDANT, a wholesaler and retailer, in consideration of being placed on plaintiffs' wholesale list and allowed their wholesale discount for the time being, agreed with plaintiffs not to sell Palmolive soap (a production of the plaintiffs) 'howsoever acquired' to the public under sixpence a tablet. The defendant now contended that the agreement was in restraint of trade, unreasonable in the interests of the public, and imposing on him a greater restriction than was reasonably required for the protection of the plaintiffs. The Court of Appeal affirmed the decision of Astbury J. and held unanimously that the agreement was reasonable in the interests of the public; and Lord Hanworth M.R. and Lawrence L.J. (Sargant L.J. dissenting) held that it was a reasonable restriction on the defendant.

The case raises the general question of the validity of contracts in restraint of trade, and the particular question of the validity of price

maintenance agreements. As regards the general question, there is now no doubt that the original rule that all restraints of trade were *ipso facto* bad has been very much modified. A succession of cases, keeping touch with the progress of trade, has provided exceptions to the general rule. The law first distinguishes, as a special class of which it must always be suspicious, agreements, such as those between master and servant, where the parties are not on an equal footing: *Attwood* v. *Lamont* [1920] 3 K. B. 571. The law, however, regards more favourably agreements, such as the present one, where the parties are in an equal position of bargaining. In determining the validity of either type, the Courts have adopted the general test given by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535, 565, '. . . it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public.' This test may be regarded as a formula whereby exceptions to the general rule, that all restraints of trade are bad, may be multiplied. But it is difficult to classify these exceptions, on account of the flexibility of the *Nordenfelt* tests and of the vigour with which this part of the law is being developed. Each covenant that satisfies the tests and is upheld in a sense forms an exception *sui generis*. As Lawrence L.J. says in the present case (p. 280), 'As each case must necessarily depend upon its own special facts not much guidance is obtained from decisions upon other and different facts.' But it is perhaps possible to segregate two classes of exception. The first comprises agreements dealing with the sale of goodwill of a business. See Younger L.J. in *Attwood* v. *Lamont* [1920] 3 K. B. 571, 581 *et seq.* The second comprises agreements for the maintenance of prices, which have been upheld in a number of cases, for example, *North Western Salt Co.* v. *Electrolytic Alkali Co.* [1914] A. C. 461, and *Att.-Gen. of Australia* v. *Adelaide Steamship Co.* [1913] A. C. 781. Lord Hanworth said in the present case (p. 271), 'So far as the public is concerned . . . slight evidence—if any—is needed to justify an agreement for the maintenance of prices.'

But the Court was still faced with the substantial question, Is the agreement unreasonable in the interests of the parties? This question could be answered only by applying to the circumstances of each particular case such tests as: Is provision made for withdrawal? How long is the restriction to last? Does it extend to the whole trade of the defendant? Is it likely to give rise to a situation where the defendant is prevented from trading altogether, as in *Joseph Evans & Co.* v. *Heathcote* [1918] 1 K. B. 418? Applying these principles to the present case, and following the decisions in *Elliman, Sons & Co.* v. *Carrington & Son* [1901] 2 Ch. 275, and *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1913), 29 T. L. R. 270, Lord Hanworth and Lawrence L.J. were satisfied that the agreement was not unreasonable in the interests of the defendant. It was not unreasonable that the restriction extended to all sources of supply, for any scheme that is to maintain prices effectively must do that; and the same must be said of the fact that no means of withdrawal was provided. In any case, it was not probable that defendant's trade would be seriously affected if he never sold the particular goods of the plaintiff again, for defendant dealt in many proprietary articles of the same kind not provided by plaintiffs. Sargant L.J. did not differ on the principles to be applied, but he considered that the facts revealed a one-sided, catching agreement.

He held that defendant did not appreciate at the time of making the contract the scope of the restrictions, which were severe, particularly in being unlimited in point of time.

It is interesting to compare *English Hop Growers, Ltd.* v. *Dering* [1928] 2 K. B. 174 (*supra*). In both cases, price maintenance agreements were upheld. But whereas in the present case the Court seemed to be more concerned with the interests of the promisor, in the *Hop Growers' Case* the Court seemed more concerned with the interests of the promisee. This is probably due to the fact that in the former the parties were buyer and seller, and the restraint was designed primarily to protect the seller, whereas in the latter the parties were co-operating to protect all concerned.

D. H. W. H.

CONTRACT—TRADE ASSOCIATION—ENFORCEMENT OF RULES BY 'STOP LIST' —CONSPIRACY—DURESS—MONEY HAD AND RECEIVED.

Hardie & Lane, Ltd. v. *Chilton* (*No.* 2). [1928] 2 K. B. 306. 97 L. J. K. B. 539.

THE Motor Trade Association was registered as a trade union. It was composed of motor manufacturers and traders, and its object was to protect their interests by endeavouring to prevent agents from selling cars at prices other than those fixed by the association. This object was enforced by putting on a 'stop list' those who infringed this rule, the result being that such persons could get no goods from members of the association. The plaintiffs were motor dealers, and became members of the association in 1920. In March, 1926, the defendants, who were officials of the association, wrote to the plaintiffs to the effect that facts concerning them had been brought to their notice, and would be brought before the 'Stop List' Committee at a meeting at which the plaintiffs' attendance was invited. The plaintiffs admitted that they had sold a car to another member of the association at less than the fixed price. Subsequently the defendants wrote to the plaintiffs saying that the 'Stop List' Committee were prepared to recommend to the council of the association that if the plaintiffs agreed to pay a fine of £200, and to return the price of the car in question (£225), and to pay £7 for an insertion in the *Motor Journal* to the effect that they (the plaintiffs) would in future observe the protected prices, there should be an end of the matter. To this the plaintiffs agreed, and on March 28, 1926, they paid £332, which included £100 as a first instalment of the fine, a further £100 to be paid within three months. But shortly afterwards, in *R.* v. *Denyer* [1926] 2 K. B. 258, the Court of Criminal Appeal decided that to obtain money by threat of a 'stop list' was a criminal offence. Denyer was one of the defendants in the present action, and thereupon the plaintiffs refused to pay the second £100, and sued the defendants for damages to the extent of what they had paid, or, alternatively, to have it returned to them as money had and received by the defendants to the use of the plaintiffs. Avory J. directed the jury that for two or more persons to obtain money, for which there was no legal claim, by threats calculated to deprive a reasonable man of his voluntary power of action, was illegal. The jury found for the plaintiffs, and awarded damages to the extent of £132, being the fine paid together with

their estimate on the loss of the car which they had had to buy back. The Court of Appeal, in a considered judgment, unanimously reversed this decision.

Now this decision of the Court of Appeal was in direct conflict with that of the Court of Criminal Appeal in *R.* v. *Denyer* referred to above, and the judges of the Court of Appeal definitely said in their judgments that in their opinion *R.* v. *Denyer* had been wrongly decided. Prior to that case the legality of the 'stop list' had been upheld by the Court of Appeal in *Ware & De Freville* v. *Motor Trade Association* [1921] 3 K. B. 40, a case approved by the House of Lords in *Sorrell* v. *Smith* [1925] A. C. 702. The reason given for the decision in *R.* v. *Denyer* was that it was a contravention of the Larceny Act of 1916, s. 29, sub-s. 1, which punishes with penal servitude for life anyone who 'utters, knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause, any property or valuable thing.' In the present case the reasons which the judges of the Court of Appeal gave for their decisions were as follow:—The legality of the 'stop list' had been settled by the decisions cited above. Therefore the defendants in this case had a legal right to carry out their threat. Further, this legal right provided the 'reasonable cause' necessary to satisfy the Larceny Act. In *R.* v. *Denyer* it was said (p. 269) that a 'person has no right to demand money, according to the Act of Parliament [the Larceny Act] as a price of abstaining from inflicting unpleasant consequences upon a man.' But this sweeping statement is untrue. What of a cook who threatens to give notice unless her wages are raised? Is she guilty of a crime? Is it a crime also to withdraw a libel case, as is often done, if the other party will apologize and pay costs? Certainly not, according to Scrutton and Sankey L.JJ. (pp. 321, 328). In this case, both parties had a right to compromise their full rights for something more lenient. The defendants had the power to place the plaintiffs on the 'stop list.' They gave them the option of a fine: what can be more eminently reasonable? The question of reasonable or probable cause is one for the jury, but only when there is evidence of its absence. Here it was obviously present. The case should therefore have been withdrawn from the jury.

The judges of the Court of Appeal did not decide what the Act means by 'probable cause,' because, as reasonable cause was in their opinion present, it was unnecessary for them to do so. This is unfortunate, for the meaning of the whole phrase is far from clear; and it is upon this phrase that the whole question rests. Mr. A. L. Goodhart, in an article (44 *Law Quarterly Review*, 436—449) pointing out the conflict which at presents exists in the matter between the Court of Criminal Appeal and the Court of Appeal, has suggested as a solution the sub-division of 'legal liberties' into 'legal and moral liberties' and 'legal and immoral liberties.' The former class are those liberties which the law recognizes and approves, the latter are those liberties which the law recognizes but disapproves; it will not punish a man for taking advantage of an 'immoral liberty,' nor will it prevent him from doing so, but it will not further the act. Thus to walk down a street is a liberty both legal and moral, but to show a compromising letter, though legal, is immoral, and the law will not encourage a man to do such a thing. Mr. Goodhart suggests therefore that, if the *dictum* of the Court of Appeal in *Hardie &*

Lane v. *Chilton* that a forbearance from doing a legal act provides reasonable cause for a demand for money were qualified by the addition that the legal liberty should also be a 'moral' liberty, we should be provided with a guide as to what constitutes 'blackmail' and what does not. Another contributor to the *Law Quarterly Review* has denied the applicability of Mr. Goodhart's distinction to criminal law (45 *L. Q. R.* 15—17). He, too, recognizes that the vital words of the Act are 'reasonable or probable cause,' but he asserts that that phrase is intended to refer directly to the money demanded. Thus he denies that the man who withdraws a libel action in return for an apology and the payment of costs is criminally liable, because he presumably has some reasonable or probable cause, else he would not have commenced an action. He explains the decision of the Court of Criminal Appeal in *R.* v. *Denyer* by the magnitude of the sum demanded. If it had been £10 instead of £250 he thinks it would have been a reasonable payment for the trouble caused to the association. But this attempted distinction is bound to be always only a matter of degree, and would surely prove cumbersome. Is a cook who asks for a rise of £100 in her wages on pain of giving notice guilty of blackmail? Or is she innocent so long as she asks less than £150? Surely it might be contended for her that she is a particularly good cook. Again, it appears as if the fines inflicted by the Motor Trade Association were not intended to be a measure of the trouble caused, but rather to act as deterrents. True, the original deterrent is the 'stop list,' but if they wished to let a man off such a great punishment as that constituted, it would not do to let him go 'scot free.'

The distinction between 'moral' and 'immoral' legal liberties seems far more promising; it provides a definite line of division drawn exactly in the right place. Why should any more difficulty be experienced in applying this test to cases in criminal law than is experienced in the thousands of cases in which it is applied to contract?

F. McL. B.

CRIMINAL LAW—EVIDENCE—CARNAL KNOWLEDGE OF GIRL UNDER SIXTEEN YEARS—NECESSITY FOR CORROBORATION—MISDIRECTION.

R. v. *Whitehead.* [1929] 1 K. B. 99. 98 L. J. K. B. 67.

AT the Glamorgan Assizes, before Humphreys J., a jury convicted the prisoner of having had unlawful carnal knowledge of a girl under sixteen years of age. About three months after the alleged offence her mother had noticed the girl's condition, and questioned her about it. The learned judge refused to receive the girl's story to her mother as evidence, and in summing-up, after warning the jury of the danger of convicting in such cases without corroborative evidence, he proceeded: 'In my judgment, what the girl said to her is not admissible in evidence, but you know what the girl said—it is obvious—because you know what the mother did. As soon as the girl spoke to her she took her to the doctor, and the doctor said she was pregnant, and it is perfectly clear that the girl must have at once said that it was the prisoner who was responsible for her condition, because the prisoner is at once accused' by the mother's laying an informa-

tion before the magistrate. The prisoner's only comment to the police officer on being formally charged was, 'I don't wish to say anything now.' The learned judge ruled that the jury were entitled to regard the failure to deny the charge as corroborating the girl's evidence. An appeal was allowed by the Court of Criminal Appeal on the ground of misdirection.

Several interesting questions arise. First, as to the necessity for corroboration in crimes of a sexual nature, the rule is laid down in *R.* v. *Jones* (1925) 19 Cr. App. R. 40: The jury should be directed that it is unsafe to convict upon the uncorroborated testimony of the prosecutrix, but the jury may, after paying attention to that (the judge's) warning, nevertheless convict. The rule is said to be one not of law but of prudence. In *R.* v. *Baskerville* [1916] 2 K. B. 658—a case involving accomplices where the same principle applies—Lord Reading C.J. laid it down that corroboration must be in some material particular implicating the prisoner. On the question of its necessity, Lord Reading went on to say that even if such a warning had been given a conviction will be quashed if the Court thinks the verdict unreasonable or that it cannot be supported, having regard to the evidence.

Secondly, the law is clear that the girl's story to her mother, since it was not part of *res gestae* must amount to a complaint made at the first reasonable opportunity after the alleged crime. (If it were not for *R.* v. *Osborne* [1905] 1 K. B. 551, one might have thought that a mere statement in reply to a question is not a 'complaint' at all, but that decision settles the point the other way.) Lord Hewart C.J., in delivering the judgment of the Court, had no difficulty in holding that the interval between the offence and the interview with the mother was too long to make such interview the first reasonable opportunity, and went on to add that in any case the story could not be considered as evidence corroborative of the prisoner's guilt since it proceeded from the very person to be corroborated. *R.* v. *Lillyman* [1896] 2 Q. B. 167, and *R.* v. *Osborne* [1905] 1 K. B. 551, which are authorities for this view, make it clear that evidence of the details of the complaint is admissible; and this is so even where want of consent in the prosecutrix is—as in this case—no ingredient of the crime itself; for the complaint is admitted not as evidence intrinsically corroborating the prisoner's guilt but for the purpose of showing the consistency of the conduct of the prosecutrix with the story told by her in the witness box.

In the present case the Court quashed the conviction on the misdirection of the trial judge in ruling that the prisoner's reply to the police officer might be construed as corroborative evidence, and this is the remaining point to be considered.

Qui tacet consentire videtur is a maxim narrowly limited in cases of this nature to circumstances where an accusation naturally calls for contradiction. Generally speaking, it has little application to statements made by third persons having no interest in the case. Such accusations might well be rebutted by silence. In *R.* v. *Christie* [1914] A. C. 545, the House of Lords decided that a prisoner's silence or reply in the face of an accusation is admissible as evidence of the prisoner's demeanour; but that where there is such denial the judge, in view of its trivial weight, and of its likelihood of prejudicing the jury, ought not to admit the statement denied. Lord Alverstone C.J., in *R.* v. *Tate* [1908] 2 K. B. 680, whilst admitting that the absence of an indignant repudiation of

a charge might in some cases be some corroboration, declined to regard it as such in that case where the prisoner was silent on being formally charged. The Court came to the same conclusion in *R.* v. *Marsh* (1925) 19 Cr. App. R. 27, though the case is not quite so strong, since the formal charge was subsequent to the arrest and no evidence had been tendered of the prisoner's demeanour when arrested.

O. I. F.

GIFT—UNDUE INFLUENCE—FIDUCIARY RELATIONS—INDEPENDENT LEGAL ADVICE.

Inche Noriah v. *Shaik Allie Bin Omar.* [1929] A. C. 127. 98 L. J. P. C. 1.

THE appellant, a Malay woman of great age and wholly illiterate, executed a deed of gift of landed property in Singapore of considerable value in favour of her nephew, the respondent, who had complete control of all her affairs. Before executing the deed the appellant had independent legal advice from a lawyer, who had acted in good faith. But he was unaware of the fact that the gift constituted practically the entire property of the appellant, and failed to impress upon her that it would be a more prudent and no less effective method of benefiting the donee to leave him the property by will. After considerable difference of opinion in the Straits Settlements Courts, the Judicial Committee of the Privy Council held that the gift should be set aside, as the presumption of undue influence which had arisen from the relationship of the parties was not adequately rebutted. Their lordships had no difficulty in holding that the presumption of undue influence was raised from the relation of the parties. The interest in the case turns on the force and extent of independent advice in rebutting this presumption.

The principle of law on the point is stated in the dissenting judgment of Cotton L.J. in *Allcard* v. *Skinner* (1887) 36 Ch. D. 145, 171: 'Where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor . . . the Court interferes, not on the ground that any wrongful act has been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.' That is to say, in the event of the presumption of undue influence arising (a matter of fact in this class of cases), the donee could only succeed if he established that (we again quote Cotton L.J.) it 'was the spontaneous act of the donor acting in circumstances which enabled her to exercise an independent will.' If we grasp correctly the somewhat ambiguous language of the report at pp. 135—136, the Judicial Committee seem to have held (i) that independent advice is only one of the ways in which the presumption can be rebutted; (ii) that, where such advice is given, it may be enough to upset the presumption, though it is not followed; (iii) that such advice need not be *legal* advice. The respondent tried to upset the presumption by arguing that (*a*) the appellant had independent legal advice from a lawyer acting in good faith; (*b*) that when one of the appellant's relatives hearing of the deed of gift sent a lawyer to see her, she was much

incensed at his coming, and stated that she had made the deed voluntarily, and that she did not wish the transaction to be set aside. On neither point did he succeed. For as to (*a*), a knowledge of all relevant circumstances is necessary, and 'in the present case their lordships do not doubt that Mr. Aitken acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing.' With regard to (*b*), the point might have been a good one (though their lordships did not deal directly with it) if the advice given had been upon a knowledge of all material facts.

N. M. G. F.

International Law—Diplomatic Privilege—Immunity from Judicial Process—Official at Embassy—Consular Secretary—Statement by Attorney-General on Behalf of Foreign Office—Affidavit of Defendant as to Grounds of Immunity—Right of Plaintiff to Cross-examine.

Engelke v. *Musmann.* [1928] A. C. 433. 97 L. J. K. B. 789.

The material facts in this case were as follow. The respondent issued a writ in the King's Bench Division against the appellant for payment of arrears of rent and dilapidations under a lease of a house in Hampstead. The appellant entered a conditional appearance, and took out a summons to set aside the writ on the ground that he was in the service of the German ambassador. He filed two affidavits to the effect that, since November 25, 1920, he had been exclusively employed as a member of the German ambassador's staff; that in 1923 he was promoted to the post of Consular Secretary; that before the war the duties of this post were undertaken by a Consul or Consul-General, but were now, in all towns where an ambassador was appointed, performed by that ambassador; that his appointment as a member of the embassy staff was notified to the British Foreign Office on November 30, 1920; and that his name was on the Diplomatic List issued by the British Foreign Office. The respondent asked leave to cross-examine the appellant on his affidavit, and filed an affidavit stating that the appellant was a member of the consular, and not of the diplomatic, staff; in which case, of course, he would not be entitled to immunity from judicial process. Shearman J. gave leave to cross-examine, but at the same time gave leave to appeal.

In the Court of Appeal the Attorney-General, at the request of the Court, attended and informed it, on the instructions of the Secretary of State for Foreign Affairs, that the defendant had been appointed a member of the staff of the German ambassador under the style of Consular Secretary, and that his position as a member of the embassy was, and had been since 1920, recognized by the British Government without reservation or condition of any sort.

Scrutton L.J., however, in whose judgment Sargant L.J. concurred, declined to accept the Attorney-General's statement as conclusive, on the

ground that acceptance of it would be to substitute a government department for the Courts in a class of case (mere servants of an embassy) where such substitution had never yet been recognized; and the appeal was dismissed against the dissent of Lord Hanworth M.R. The House of Lords, in reversing the decision of the Court of Appeal, were agreed that the sole point at issue was the method by which the status of any person who claims the benefit of diplomatic privilege is to be determined.

Lord Buckmaster (in whose judgment Lord Blanesburgh concurred) held that both upon principle and upon authority the statement of the Attorney-General was conclusive. He said that '*Duff Development Co.* v. *Kelantan Government* [1924] A. C. 797 is a clear authority that the method of proving the status of sovereigns or of . . . ambassadors . . . is by the very method that is challenged in the present case. The statute [7 Anne, c. 12, conferring immunity] however, draws no distinction between the ambassadors and what, in the language of the Act of Parliament, is described as the "domestic or domestic servant of any such ambassador," and it seems difficult to understand when the principle is admitted with regard to the one that it should not apply in relation to the other, for the privilege is the same in each case. With regard to the sovereignty of a particular State and whether or not a particular person is a sovereign ruler, the case referred to makes the general principle plain' (pp. 442—443); and he cited words of Lord Dunedin in that case: 'Once you trace the doctrine of the freedom of a Foreign Minister from interference by the Courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition.' Lord Buckmaster added: 'The acceptance and recognition of persons who form the staff of an ambassador are matters which, having regard to the practice in the conduct of foreign affairs, are equally based on the comity of nations and necessarily also within the cognizance of the Crown acting through the Foreign Office. They are in a position to know what are the duties performed and the persons who perform them' (p. 443).

Upon the point of authority, Lord Buckmaster referred to the following cases. In *Crosse* v. *Talbot* (1724) 8 Mod. 288, a question arose as to whether a particular person was on the staff of the Duke of Holstein's resident here, and a certificate was produced which stated that he was a valet de chambre of the resident. The Court, however, held that he was not within the privilege, but the certificate of the resident as to what his status was does not appear to have been challenged. In cases like *Seacomb* v. *Bowlney* (1743) 1 Wils. 20, and *Triquet* v. *Bath* (1764) 3 Burr. 1478, the dispute was in fact tried upon affidavit, and the only questions were whether these affidavits showed that the status was sufficient to secure the protection. In *Heathfield* v. *Chilton* (1767) 4 Burr. 2016, the dispute was as to whether the person in whose service was the defendant, who had been arrested, was himself within the privilege. Lord Mansfield there said: 'This is not an application by the Attorney-General. . . . That indeed would have shown that the Crown thought this person intitled to the character of public minister. It now remains uncertain what his proper character is.' In *Fisher* v. *Begrez* (1832) 1 Cr. & M. 117, the question was as to whether a chorister was within the protection, and it was there held that the certificate itself was not a sufficient authority that the defendant was, as a chorister, a domestic servant, and therefore privileged.

This case appeared to favour the respondent (the plaintiff in the original action), but Lord Buckmaster classified it with the 'affidavit' cases, and Lord Phillimore (at p. 453) regarded the certificate as not emanating from the Secretary of State but as being no more than a sheriffs' list. These older decisions were not of much assistance, but the later cases were more instructive. In the first of these, *Macartney* v. *Garbutt* (1890) 24 Q. B. D. 368, a question arose as to whether a British subject accredited to Great Britain by a foreign government as a member of its Embassy was liable to distress on his furniture for rent. Mathew J. based his judgment upon the reception of the person as secretary by the British Government, the submission of his name to the Foreign Office, and his recognition by that department without any reservation. Lord Buckmaster said that these circumstances could only be proved either by a person speaking on behalf of the Crown as representing the Foreign Office, or by such person giving evidence and being subjected to cross-examination: but directly the matter is based upon the reception and recognition by the Foreign Office it seems impossible to suggest a reason why such recognition should be good in the case of an ambassador, and bad in the case of his staff.

In *The Parlement Belge* (1880) 5 P. D. 197, 199, James L.J. stated that the question whether recognition by the Crown of an ambassador could be accepted, if the person had not in fact been sent as an ambassador, was outside the authority of any municipal Court, and adds: 'I apprehend that we should be bound to act on the representation of the Foreign Office.' It was further decided in the Court of Appeal in *Re Suarez* [1918] 1 Ch. 176, that a letter from the Foreign Office, stating that a minister's name had been removed from the Diplomatic List was sufficient evidence that he had ceased to hold diplomatic office at the date of the letter.

There was no weight in the contention that a decision in favour of the defendant would be extending diplomatic privilege to the consular service, for, whatever he was styled, the defendant was an accredited member of the ambassador's household. And though diplomatic privilege, like all other privilege, may be capable of abuse, the privilege itself is indispensable to amicable international relations. Finally, it would be calamitous if in matters like this the executive were to speak with one voice and the judiciary with another.

On these grounds the House held that the appeal should be allowed, and that the order of the Court of Appeal, that the defendant should attend for cross-examination, should be reversed. Lord Dunedin held however that, apart from the statement of the Attorney-General, the order for cross-examination would have been justified.

A. H. O.

International Law—Action for Enforcement of Foreign Revenue Laws in English Court—Claim for Succession Duty—Cognizance of English Courts in such Proceedings—Application to Strike Out—R. S. C., Order XXV, r. 4.

Re Visser. H.M. The Queen of Holland v. *Drukker.*
[1928] Ch. 877. 97 L. J. Ch. 488.

The plaintiff, H.M. the Queen of Holland, the reigning sovereign of the Netherlands, brought an action as a married woman in this country,

claiming (*inter alia*) a declaration that she was a creditor of the estate of one Visser, deceased, a Dutch subject, domiciled in Holland, and for an order for an account. The defendants Drukker and Zeegen were sued as executors or administrators of Visser, and the defendant Bisschop as administrator of the personal estate in England of Visser. The plaintiff in her statement of claim alleged that according to the law of Holland the estate of the said Visser was liable for succession duty.

Zeegen now moved the Court in the action for an order that the plaintiff's statement of claim be struck out under R. S. C., Order XXV, r. 4, on the ground that it disclosed no reasonable cause of action. The question raised by these proceedings was whether the English Courts would recognize and enforce a claim in England made by a foreign State against the subjects of the foreign State in respect of revenue due from the foreign subject.

A number of cases were cited bearing in various ways on this question. Some were cited which contained merely *dicta* on the point. Thus in *Emperor of Austria* v. *Day* (1861) 3 D. F. & J. 217, at p. 242, where Lord Campbell in the course of his judgment said: 'But, although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, "revenue laws" have always been made the exception.' So, too, in *Cotton* v. *The King* [1914] A. C. 176, 195, Lord Moulton in the course of his judgment said: 'There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries.' These *dicta* bore directly on the point and gave colour to the argument that it is a long-established principle that the Courts of this country will not assist foreign States to collect their revenue. But being merely *dicta* they did not bind the Court. Other cases containing *dicta* to the same effect are *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343; *Planché* v. *Fletcher* (1779) 1 Doug. 251, 253. On the other hand, it was urged that Scrutton L.J. in *Ralli Bros.* v. *Campañia Naviera Sota y Aznar* [1920] 2 K. B. 287, 300, regarded the point as still open.

No case seems to have been decided on the actual point, though in *James* v. *Catherwood* (1823) 3 Dow. & Ry. 190, the point came up in connexion with what might be admitted as evidence in an action for money lent, and there judgment was given in no uncertain terms. Abbott C.J., at p. 191, said: 'This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke, that in a British Court we cannot take notice of the revenue laws of a foreign State.'

There was, however, one case, almost, if not quite, identical with the present one. In *Municipal Council of Sydney* v. *Bull* [1909] 1 K. B. 7, the point in dispute differed in but one respect from that in the present case—in that case the plaintiffs were a foreign municipality, while in the present case the plaintiff was a foreign sovereign. Relying on this difference, it was claimed for the plaintiff that the judgment in that case (given against the municipality's claim to recover taxes) did not apply in the present one. But Tomlin J. in his judgment said (at p. 883): 'I do not see myself that any distinction, or valid distinction, could be drawn between a plaintiff sovereign State—a foreign sovereign State—and a plaintiff foreign municipality, seeking in the one case to recover State taxes, and in the other seeking to recover the local municipal taxes or

rates.' He therefore declared himself bound by the judgment in *Municipal Council of Sydney* v. *Bull*, and decided that the application must succeed and the plaintiff's statement of claim be struck out. He added that, apart from the decision in *Municipal Council of Sydney* v. *Bull*, it was his own opinion (at p. 884) that 'there is a well recognized rule, which has been enforced for at least 200 years or thereabouts, under which these Courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States.' The learned judge regarded cases like *Alves* v. *Hodgson* (1797) 7 T. R. 241 and *Clegg* v. *Levy* (1812) 3 Camp. 166, as explicable on the ground that if revenue law merely affects the admissibility in evidence of a document and not its validity, the document is none the less valid because of a provision of the revenue law.

This *dictum* is also found in Dicey's Conflict of Laws (4th ed.) (1927) p. 224, r. 54: 'The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State.' The word 'revenue' did not appear in this rule in the first two editions of the work and it was contended fruitlessly for the plaintiffs that its inclusion in the 3rd and 4th editions was supported by authorities resting on very slight foundations. The reason for the rule is either commercial convenience or, preferably, the possibility of foreign revenue legislation being definitely injurious to British interests or prejudicial to political refugees here (*ibid.* 226).

H. F. R.

Principal and Agent—Power of Attorney—Cheque Drawn on Principal's Account—Fraud on Principal.

Reckitt v. *Barnett, Pembroke & Slater, Ltd.* [1929] A. C. 176. 98 L. J. K. B. 136.

The plaintiff R gave T a power of attorney to enable the latter to manage R's affairs while R was abroad. There was no specific power to draw cheques and some question was raised by R's bank. R thereupon wrote to the bank saying: 'Referring to the power of attorney . . . please note that I wish the power to cover the drawing of cheques upon you by T without restriction.' T bought for himself a Rolls Royce car under a hire-purchase agreement from the defendants. It was common ground that the transaction was one made by T personally as principal, and that the defendants always so regarded it. T gave the respondents a cheque for £200, £175 being the first instalment under the agreement and £25 being on account of the running account of T's former car. The cheque was signed 'Sir Harold J. Reckitt, Bart., by Terrington his Attorney.' The defendants accepted it without inquiry, and treated it as if drawn by T on his own account, as they failed to notice in the signature anything except T's name, the matter relating to Reckitt and the power of attorney being rather faintly impressed by a rubber stamp. R ascertained that frauds had been committed by T, and this action was begun to recover from the defendants the £200 which they had received as proceeds of the cheque.

The action was tried before Rowlatt J. and the appellant recovered judgment. The Court of Appeal (Scrutton and Sankey L.JJ.; Russell J.

dissenting) reversed this decision. The House of Lords restored the decision of Rowlatt J.

The House followed the decision of the Privy Council in *John* v. *Dodwell & Co.* [1918] A. C. 563. At p. 569 in that case it is said: 'When an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is . . . in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal.' An agent, who held a power of attorney which enabled him to draw cheques on his principals' banker, paid his personal indebtedness with such cheques. It was held that the payee had notice of what was *prima facie* a breach of duty which deprived him of all title to hold the cheques against the principals. Notice of a *prima facie* breach was sufficient. Where an agent uses a cheque of his principal for the purpose of paying his own debts the person receiving that cheque is immediately put on inquiry, there being a *prima facie* breach of duty.

The law as laid down in *John* v. *Dodwell* was not disputed and the question was largely one of construction. What was the effect of R's letter to the bank? Did it amplify the power of attorney so as to authorize the attorney to draw cheques for any purpose including the payment of his own debts? Scrutton and Sankey L.JJ. in the Court of Appeal held that it did, but the House of Lords disagreed with them. Lord Hailsham, L.C. said (at p. 182): 'It is plain that the letter has to be read in conjunction with the power of attorney to which it expressly refers; when so read it seems to me that the whole authority is expressly limited to acting for the appellant and in the management of his affairs; and I cannot construe the addition of the words "without restriction" as entitling Lord Terrington when he is drawing cheques on the appellant's account to do so for any other purpose except for the discharge of the appellant's debts or in the conduct of his business.' Lord Dunedin added (at p. 38) that the effect of the letter seemed to him to be 'exactly the same as if the original power of attorney had had a clause at the end, "and for the purposes aforesaid I wish that Terrington be allowed to draw cheques without restriction."'

The defendants in this case had relied on *Hambro* v. *Burnand* [1904] 2 K. B. 10, but the Lord Chancellor in distinguishing this case, said (at p. 183): 'The act done by Burnand was within the actual authority conferred upon him, although his motive in doing the act was to benefit himself and not his principals.'

The majority of the Court of Appeal placed reliance on *Corporation Agencies* v. *Home Bank of Canada* [1927] A. C. 318, but as has been pointed out by Professor Gutteridge in 45 L. Q. R. p. 7 that case was hardly in point. 'The action in that case was against a banker collecting a cheque without notice of any irregularity, and not against the recipient of the proceeds of the cheque, a state of fact which raises different issues to those involved in a claim against a payee receiving a cheque with notice that it is drawn by an agent on his principal's banking account in payment of a private debt.'

J. R. R.

Sale of Goods—Sale by Description—Implied Condition of Merchantable Quality—Defective Bottle—Sale of Goods Act, 1893, s. 14, sub-s. 2.

Morelli v. *Fitch and Gibbons.* [1928] 2 K. B. 636. 97 L. J. K. B. 812.

The most remarkable point about this case was the ingenuity displayed by counsel for the appellants, Fitch and Gibbons, in attempting to establish an unsound claim. The facts of the case were very simple. The plaintiff went to the defendants' public-house and asked for a bottle of Stone's ginger wine, which he received and paid for. When attempting to draw the cork at home, the neck of the bottle came away, the bottle fell to the ground and the plaintiff's left hand, which had been holding the bottle, was cut 'somewhat severely.' The County Court judge held that the plaintiff was entitled to recover by reason of section 14, sub-section 2 of the Sale of Goods Act, 1893, which enacts that '. . . where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.'

The appellants' case before a Divisional Court was based upon two grounds: (1) that the sale was not a sale by description; and (2) that there was no evidence on which the County Court judge could find that the bottle was not of merchantable quality.

The only argument in favour of the first contention was a *dictum* of Vaughan Williams L.J. in *Wren* v. *Holt* [1903] 1 K. B. 610 (the decision itself was admittedly the other way). The learned Lord Justice said (at p. 615): 'Speaking candidly, I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words "by description" as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within this sub-section (*i.e.* Sale of Goods Act, s. 14, sub-s. 2). But in this case we have to consider the findings of the jury.' The sale over the counter in *Wren* v. *Holt*, which was similar to the sale in the present case, was held to be a sale by description. It is, indeed, difficult to see how any Court could hold otherwise. In this case, the plaintiff asked for a bottle of Stone's ginger wine at 2s. 9d. The defendant, who most certainly dealt in goods of that description, handed the plaintiff such a bottle. To hold that such a transaction is not a sale by description is to introduce an undesirable subtlety into the terms of a clear provision. As Branson J. said in the present case (at p. 643): 'I confess that the meaning of the learned Lord Justice is not very clear to my mind . . .'

The appellants' second contention was that there was no evidence upon which the County Court judge could find that the bottle was not of merchantable quality, because the defect was not such as an ordinary reasonable examination would have disclosed and therefore the plaintiff could have resold it had he so desired. This argument seems to involve the giving to words a meaning they never possessed. The sub-section says nothing about the possibility of resale; and, indeed, according to Farwell L.J. in *Bristol Tramways etc. Co. Ltd.* v. *Fiat Motors, Ltd.* [1910] 2 K. B. 831, 841, the sub-section applies whether the purchaser buys for

his own use or to sell again. 'The purchaser,' said Lord Ellenborough in *Gardiner* v. *Gray* (1815) 4 Camp. 144, 'cannot be supposed to buy goods to lay them on a dunghill,' and that seems to have been the appropriate destination of this bottle of ginger wine. The fact that the defect was not such as could have been discovered on reasonable examination makes the seller liable—it clearly does not exonerate him. It should be noted that section 14, sub-section 2 does not cast upon the buyer any duty to examine the goods at all.

D. W. D.

TORT—CHAMPERTY—MAINTENANCE—SOLICITOR—SPECULATIVE ACTION.

Wiggins v. *Lavy.* (1928) 44 T. L. R. 721.

THIS was an appeal by the defendant from a decision of Branson J. by which he was cast in damages for maintenance and champerty.

It was alleged by the plaintiff that Lavy, a solicitor, procured Miriam Schneider and her infant son, acting through his father, to bring an action for damages against Wiggins, that he had wrongfully maintained that action and entered into a champertous agreement with regard to it. The Schneiders had been injured in an accident, caused by a car in which Mr. Wiggins had been driving, and then retaining defendant as their solicitor had brought an action for damages against the plaintiff. As to the champertous agreement, it is difficult to gather from the report what the facts were. But it seems that the defendant was connected with an organization, the 'Legal Aid Society,' which undertook litigation for poor people, receiving no payment if the action was lost, but deducting 10 per cent. of all damages recovered. This organization sent out circulars informing those who had been involved in accidents of their terms as set out above. It was alleged in this case that the Schneiders had been induced by defendant to employ him as their solicitor on terms which were partly oral and partly based on such a document. When an accident occurred, it was the practice of an official of the Society to introduce the injured person to defendant, 'who took up the case for him.' Defendant had kept a book showing the transactions which had taken place. Sometimes the persons threatened paid without fighting; 2s. in the £ were deducted from the amount received, but defendant had kept no record of those accounts. In this particular case, the defendant had written to the driver of the vehicle the very day after he had been retained as solicitor for the Schneiders, but the actual proceedings did not begin till eleven months later.

It was contended by the defendant that he was not guilty of champerty or maintenance, and that, even if he was, special damage had not been proved, nor was the society acting as his servant or agent, or under his authority.

It was argued that a solicitor could undertake a case for a poor client without being guilty of maintenance, and Lord Russell C.J. was quoted as having said in *Ladd* v. *London Road Car Co.* (The Times, March 24, 1900, p. 4): 'It is perfectly consistent with the highest honour to take up a speculative action in this sense, *viz.* that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a *bona fide* cause of action, it was consistent with the honour

of the profession that the solicitor should take up the action.' That case was referred to in *Rich* v. *Cook* ((1900) Law Times Newspaper 94—C. A.).

Lord Hanworth M.R. commented on the notable delay between the defendant's threat of an action and his actually bringing one. He pointed out that the Schneiders were very poor people and it was obvious the defendant did not wish to proceed with the action. It was difficult not to believe that the claim was really made by the defendant to get costs for himself. The case for maintenance was clearly made out; as regards champerty the matter was not so obvious. Nevertheless, there was evidence which would make it difficult to believe the defendant innocent. Lord Hanworth went on to say that when a solicitor might take up a speculative action for a poor client was hard to say. It was however a travesty to compare *Ladd* v. *London Road Car Co.* and *Rich* v. *Cook* (*supra*) with this case.

In *Neville* v. *London Express Newspaper* [1919] A. C. 368, it had been decided that damages for maintenance could not be obtained, unless special damage was shown. In this case, Mr. Wiggins worked for the Excel Co. This company was insured with the Yorkshire Insurance Co., which had undertaken Mr. Wiggins' defence. They had employed their own solicitors, and paid all costs. There was no subrogation. Hence as no special damage had been suffered, on this technical point the appeal must succeed.

There is no departure in this case from general principles. A definition of maintenance which has been judicially approved is that in *Termes de la ley*: 'Where any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing, to maintain his plea, or take great pains for him when he hath nothing therewith to do.' Champerty is, in effect, the same thing with a superadded agreement for sharing the proceeds of the litigation. Special regulations naturally apply to solicitors. It is, however, extremely difficult to say in what circumstances a solicitor may take up a case for which he is being paid only if he is successful. It is clear that when the sole motive is charity and the solicitor is receiving no payment at all, that he is legally justified in taking up an action. It would also seem from the cases mentioned above and from the *dictum* of Lord Russell, that when the client is poor, if he satisfies himself there is a *bona fide* cause of action, he will commit no wrong if he assists a client. Here, however, the solicitor used his client as a blind to obtain costs for himself. He did not bring the action on the ground of charity, nor did he satisfy himself there was a *bona fide* cause of action. The very fact, that he did not wish to proceed with the action, proved that he was not thinking of his client, or sure of his case. To maintain an action to get costs for oneself is clearly maintenance. Presumably a solicitor who charges reduced fees may in theory have the defence of charity (or more accurately 'assistance to the poor') just as a layman might have it; but it is difficult to imagine circumstances in which, as a matter of evidence, he can satisfy a Court that such charitable assistance had nothing whatever to do with his professional position, and, in any event, he could not prove this here.

E. P. B.

TORT—DEFAMATION—LIBEL—ABSOLUTE PRIVILEGE—SOLICITOR AND CLIENT.

More v. *Weaver.* [1928] 2 K. B. 520. 97 L. J. K. B. 721.

THE facts of this case were simple. The plaintiff sued the defendant for damages for libellous statements contained in letters written by the latter to her solicitors. These letters had reference to a loan made by the defendant to the plaintiff about which difficulties had arisen, and contained allegations about the financial position, character and business capacity of the plaintiff.

In the Court below Swift J., in giving judgment for the defendant, held that the statements were absolutely privileged and that there was therefore no case to go to the jury. On appeal this decision was unanimously affirmed.

Previous to this case there had been, as Scrutton L.J. pointed out in his judgment, some doubt in the authorities as to whether the privilege accorded to statements between client and solicitor was an absolute one or merely qualified, that is, could be defeated by proof of malice on the part of the person making the defamatory statement. It was for the purpose of obtaining an authoritative decision on this point that the case was allowed to come up on appeal.

It is quite certain that absolute privilege is possessed by judge, counsel and witnesses with regard to statements made by them in performance of their duty in a Court of law, because as the Lord Justice said: 'There are certain relations of life in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and in order that their duties may be carried on freely and without fear of any action being brought against them, it says: "We will treat as absolutely privileged any statement made in the performance of those duties"' (pp. 521—522).

But the question was, does this immunity extend to the relations of solicitor and client, when the former is consulted by the latter and in the course of negotiations the client makes untrue statements with a view to obtaining advice on them from the solicitor?

It seems curious that this important question had not come up for decision before. Be that as it may, apparently there were only two *dicta*, those of Lord Herschell and Lord Bowen in *Browne* v. *Dunn* ((1893) 6 The Reports 67, 72, 80) in support of the existence of absolute privilege, together with an opinion expressed by Fraser J. in his book on Libel and Slander (6th ed., 189, 190), while against it there was the authority of Darling J., who held in *Morgan* v. *Wallis* (1917) 33 T. L. R. 495, that the privilege was merely qualified. Scrutton L.J. gave it as his opinion that the decision in *Morgan* v. *Wallis* was erroneous on this point and therefore ought not to be followed, and in this, as in the other parts of his judgment, the other members of the Court concurred.

Of course this does not exclude the consideration of whether the statements complained of are relevant to the circumstances or not. For instance, as was suggested by the Lord Justice, a remark by a client, who was seeking advice as to repayment of a loan in the circumstances of our present case, to some such effect as this, 'Have you heard that Jones has run off with Mrs. Brown?' would be irrelevant and there would consequently be

a case to go to the jury. But in this particular case, there was not even evidence of any such irrelevancy as would justify it being left to them.

S. R. L.

TORT—DEFAMATION—SLANDER—JURY—WHETHER WORDS DEFAMATORY—NEW TRIAL.

Broome v. *Agar.* (1928) 44 T. L. R. 339.

THIS case affords an illustration of the extreme reluctance of a higher Court to set aside the verdict of a jury that the words complained of in an action for defamation are defamatory.

The plaintiff, a chauffeur, complained that the defendant, his former employer, had slandered him on two occasions. In the first place she had stated to her maid on being told that the plaintiff was out, 'I expect he is out "joy-riding" with my car now . . . Broome is a rotter.' She afterwards made a similar statement to a member of the establishment which had supplied the car and which supplied chauffeurs. The jury held that the words were spoken, but that they were not defamatory of the plaintiff. Judgment accordingly was entered for the defendant. The plaintiff then applied for a new trial on the ground that the verdict was perverse. The Court of Appeal, against the dissent of Russell J., dismissed the appeal.

Scrutton L.J. said that since Fox's Act of 1792 it was a commonplace of civil procedure that the question 'libel or no libel' was peculiarly one for the jury. Fox's Act, it is true, related only to criminal prosecutions, but it had been regarded as 'only declaratory of the Common Law.' Thus Lord Blackburn in *Capital and Counties Bank* v. *Henty* (1882) 7 App. Cas. 741, 775, stated: 'It has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel.' It is for the jury, then, to decide, whether in each particular case there is or is not a libel. A restriction on this function was however well established in *Henty's Case* (*supra*). The judge must withdraw the case from the jury, if he is of the opinion that the words are not capable of bearing a defamatory meaning. But it is a very long step to pass from this to the position that if the judge thinks that the words are only capable of bearing a defamatory meaning, he should keep on ordering a new trial until the jury returns the verdict which the judge thinks ought to be found. Cases can be found where a new trial has been so granted, but the circumstances were very exceptional. In *Levi* v. *Milne* (1827) 4 Bing. 195 (where the reporter and the defendant differed as to the spelling of the plaintiff's name), the jury found a verdict for the defendant, and a rule for a new trial was made absolute, but seemingly on the ground that Fox's Libel Act did not apply to civil cases. In *Parmiter* v. *Coupland* (1840) 6 M. & W. 105, the Court granted a new trial on the ground that the verdict was unquestionably wrong, but Alderson B. said that the judge would be wrong if he took upon himself to say that the words were a libel. In *Hakewell* v. *Ingram* (1854) 2 C. L. R. 1397 the words used were undoubtedly strong ('a sot and a brute') and a new trial was ordered on the ground that the verdict was manifestly wrong.

With regard to the procedure in such circumstances, the principles were laid down in *Metropolitan Ry. Co.* v. *Wright* (1886) 11 App. Cas. 152, 156, where Lord Halsbury stated: 'If reasonable men *might* find . . . the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact, which the law has confided to juries, not judges.'

And in slander there are more difficulties in the way of a new trial than in libel, for in the former case gesture, tone of voice, expression of countenance or the like may materially affect the spoken words. Sankey L.J. recalled the instance of the lady who in a West End drawing-room accused a noble lord of being a thief. But when one is told that she said with a smile, 'Lord X, you are a thief, you have stolen my heart,' one recognizes that to call a person a thief is not necessarily actionable.

In the case before us, the majority of the Court, though not in hearty concurrence with the verdict of the jury, nevertheless regarded it as a verdict which twelve reasonable men might find. Russell J., who dissented, did so, not with respect to the principle asserted, but on its application, for he held that no jury could reasonably find that the words were not defamatory.

E. A. C.

TORT—DEFAMATION—LIBEL—WHETHER WORDS DEFAMATORY—NEW TRIAL.

Lockhart v. *Harrison.* (1928) 44 T. L. R. 794.

THIS was an action for libel. At the original hearing, the jury found in favour of the defendant and judgment was entered accordingly. The plaintiff appealed on the ground that the verdict was against the weight of the evidence. The Court of Appeal dismissed the application. Lord Hanworth M.R. said that though he himself would have come to a different conclusion, yet it was impossible to say that twelve reasonable men could not have found the verdict they did. Atkin and Lawrence L.JJ., in deference to the opinion of Lord Hanworth, concurred, but indicated that, but for that opinion, they would have held that no reasonable men could possibly have put an innocent interpretation on the letter. The plaintiff appealed to the House of Lords, who dismissed the appeal.

The plaintiff, who had resided at Hexham all his life, was greatly interested in the development of Hexham Grammar School. In November, 1923, the Education Committee of the County Council entered into negotiations for the purchase of nine acres of land adjacent to the school. During the course of the negotiations the plaintiff offered to give to the school a strip of land adjoining the proposed purchase, and his offer was gratefully accepted. A statement to that effect appeared in the *Hexham Courant*, a local newspaper. In consequence of this the defendant wrote a letter to the *Hexham Courant*, suggesting that the plaintiff's offer of a gift was a sham; that he was really owner or mortgagee of the nine acres of land adjoining the school, for which he was insisting on an excessive price; and that thereby he was actually obtaining a good price for the strip of land, which he was pretending to give. This letter was published on October 18, 1924, and signed 'Ratepayer.'

A claim for defamation is essentially a matter upon which a jury's verdict must be taken. If the words are plainly defamatory and the

jury refuses so to decide, then the verdict is perverse, and a new trial can be ordered: *Levi* v. *Milne* (1827) 4 Bing. 195; *Parmiter* v. *Coupland* (1840) 6 M. & W. 105. If the words are not defamatory, the judge can so hold and withdraw the case from the jury. But if the matter is one which can be properly weighed by the jury, it is for them to find whether the words bear the defamatory interpretation or not. The question therefore in this case was whether the defamation was so obvious that it was impossible to believe that it could be disregarded by twelve reasonable men. An answer in the affirmative is not easily made; for, as Lord Blackburn stated in *Capital and Counties Bank* v. *Henty* (1882) 7 App. Cas. 741, 771, 'there are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.'

The judgments of the Court of Appeal in *Broome* v. *Agar* (1928) 44 T. L. R. 339 contain a statement of the law similar to that set out above, and it was re-affirmed in this case by the House of Lords. For Lord Buckmaster, in his judgment, declared that it was possible for the jury to hold that the words were not defamatory, and it was no ground for setting aside their verdict that their opinion was one he did not share. Lord Buckmaster referred with approval to the judgment of Scrutton L.J. in *Broome* v. *Agar* (1928) 44 T. L. R. 339 (noted above). He disagreed with the view of Atkin and Lawrence L.JJ. in the Court below that, because the Master of the Rolls had taken the view he did, they must accede to it. 'The fact that one judge thinks a verdict is not unreasonable does not in itself render a verdict unassailable. It is a mere expression of opinion from which others might differ, for the question of reasonability is not capable of rigid definition.' However, Lord Buckmaster, though dissatisfied with its reasoning, thought that the conclusion of the Court of Appeal must be accepted.

E. A. C.

TORT—DUTY OF ADJOINING OWNER—OWNER NOT IN OCCUPATION—RULE IN RYLANDS *v.* FLETCHER.

St. Anne's Well Brewery Co. v. *Roberts.* (1928) 44 T. L. R. 479, 703.

THE defendants were owners, but not occupiers, of a part of the ancient city wall of Exeter, which also formed the back wall of an ancient inn owned by the plaintiffs. The portion of the wall belonging to the defendants collapsed, demolishing the plaintiffs' inn.

In an action for damages, Acton J., while holding that an ancient wall was not a thing essentially dangerous in itself so as to bring the case within the rule in *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, nevertheless decided for the plaintiffs on the ground that an owner who lets ruinous premises to a tenant is liable for damage done to an adjoining owner by the fall of such premises: *Todd* v. *Flight* (1860) 9 C. B. (N.S.) 377.

The Court of Appeal (Scrutton, Lawrence, Greer, L.JJ.) reversed the decision.

Before the Court of Appeal, the plaintiffs' counsel lodged a twofold

attack, relying alternatively on the rule in *Rylands* v. *Fletcher* and on nuisance. The Court were unanimous in holding that the case under discussion did not fall within *Rylands* v. *Fletcher* on two grounds:—

(*a*) They laid down once again Lord Cairns' celebrated and much criticized *dictum* in *Rylands* v. *Fletcher* concerning the natural and non-natural user of land: 'The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place' (L. R. 3 H. L. at pp. 338—339). And as Scrutton L.J. said, 'one of the most normal uses of land, it appears to me, is to put buildings on it.'

(*b*) Furthermore, the rule in *Rylands* v. *Fletcher* applies to occupiers, and the defendants though owners were not in occupation. '*The occupier* of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape' (Salmond, Law of Torts, section 88, sub-section 1, cited by Scrutton L.J.).

Having disposed of the plaintiffs' first line of attack, the Court had to decide whether they would succeed on the remaining ground of nuisance.

In nuisance, also, the person *prima facie* liable is the occupier, but in *Barker* v. *Herbert* [1911] 2 K. B. 633, it was laid down that the occupier is not liable if he did not create the nuisance on the land which he occupies unless knowing of the nuisance, or, being in such a position that with the exercise of reasonable care he ought to have known of it, he allows it to continue. But even if the occupier were not liable, there might in the circumstances be a liability on the owner (*Todd* v. *Flight*, *supra*). This was a case tried on demurrer, *i.e.* if the statements in the declaration were true, did they give a right of action against the defendant? The declaration stated that the defendant owned a building and a stack of chimneys, which chimneys were in a dilapidated, ruinous, insecure, and improper condition, and in danger of falling and likely to fall and do damage . . . to the building of the plaintiff, and that *the defendant well knowing the premises*, demised the said building to an occupier and permitted the said chimneys to be and continue. The Court held that the plaintiff having suffered damage, and the facts being as in the declaration, an action would lie against the owner. The judge of first instance in the present action held that *Todd* v. *Flight* covered all cases in which the owner leases property which is in a defective condition, no matter how latent the defect may be. In this interpretation of *Todd* v. *Flight*, Acton J. would seem to be supported by Lopes J. in *Nelson* v. *Liverpool Brewery Co.* (1877) 2 C. P. D. 311—'landlords or owners can be made liable in the case of an injury to a stranger by the defective repair of premises let to a tenant . . . in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition.' The Court of Appeal, however, interpreted *Todd* v. *Flight* otherwise. They held that in order successfully to attack an owner not in occupation, it is necessary to show that at the time he let the premises there was a nuisance on them and that he knew it, or, with reasonable care, might have known it.

Mr. W. T. S. Stallybrass, in an admirable article in 45 *Law Quarterly Review*, pp. 118—121 (January, 1929), has criticized the narrow application by the Court of Appeal of the rule in *Rylands* v. *Fletcher*, in confining it to liability to occupiers. In support of his criticism, Mr. Stallybrass quotes Fletcher Moulton L.J. in *Wing* v. *London General Omnibus Co.* [1909] 2 K. B. at p. 665—666; and the fact that Salmond regarded the rule in *Rylands* v. *Fletcher* merely as one branch of the law of nuisance. If Salmond's classification is correct, then an owner no longer in occupation will be liable, since an action will lie against a lessee for a continuing nuisance after he has made an underlease (*Rosewell* v. *Prior* (1701) 2 Salk. 460). Fletcher Moulton L.J., however, would seem to have been uttering a mere generalization rather than a nice statement of the law when he said, 'For the purposes of to-day it is sufficient to describe this class of actions (*i.e.* the *Rylands* v. *Fletcher* type) as arising out of cases where by excessive use of some private right a person has exposed his neighbour's property or person to danger.'

In the absence of any authority on the point, it would seem that the Court of Appeal was wise in not extending the rule in *Rylands* v. *Fletcher* any further.

J. A. W. S.

Tort—Master and Servant—Servant's Negligence—Journey Not on Master's Business—No Liability on Master.

Britt v. *Galmoye & Nevill.* (1928) 44 T. L. R. 294.

The first defendant (Galmoye), who employed the second defendant (Nevill) as a van-driver and also treated him as a personal friend, lent him his private motor-car, after the day's work was over, to take friends to a theatre. On the return journey the plaintiff was injured owing to the second defendant's negligent driving.

Shearman J., while allowing the plaintiff to have judgment (if he wanted it) against Nevill, dismissed the action against Galmoye.

It was contended for the plaintiff that, inasmuch as Nevill was in Galmoye's general employment for the purpose of driving motor-cars and was driving his motor-car with his authority, the liability of Galmoye was not affected because the journey was for Nevill's benefit.

This view of the law Shearman J. had no hesitation in rejecting on the grounds that the journey was not on the master's business, who for the nonce was a mere stranger; that there was no trace of control to be found, and that although in general a principal was responsible if the servant was employed to do the class of acts in which the tort was committed, here Nevill was not employed to do this class of act, but was in the position of a stranger after his work was finished: *Lloyd* v. *Grace, Smith & Co.* [1912] A. C. 716; *Dyer* v. *Munday* [1895] 1 Q. B. 742.

This case differs from those like *Storey* v. *Ashton* (1869) L. R. 4 Q. B. 476, in which the master incurred no liability where the servant had begun on the master's business and the actionable negligence occurred while continuing on an entirely new and independent journey which had nothing to do with his employment. Here Nevill was from the outset engaged solely on his own business, *viz.* driving to the theatre women friends of his who were quite unknown to the first defendant.

The question of liability on the ground of control of proceedings came before the Privy Council in *Samson* v. *Aitchison* [1912] A. C. 844, 849, where Lord Atkinson, in delivering the judgment of the Court, cited with approval from the judgment of Williams J. in the Court of first instance. 'The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right of control.' More recently still, Scrutton L.J., in *Parker* v. *Miller* (1926) 42 T. L. R. 408, observed that the test of agency in cases of negligence had ever since *Quarman* v. *Burnett* (1840) 6 M. & W. 499 been not physical control, but right to control.

Parker v. *Miller* and *Samson* v. *Aitchison* are not mentioned in the report of the present case, but Shearman J. expressed the opinion that cases dealing with control were not of much assistance, as he could find no remnant of control, for control meant that the journey was the journey of the principal.

It would seem that the phrase 'journey of the principal' in the judgment means nothing more than 'subject to the right of control by the principal,' and that this decision of Shearman J. does not extend the law relating to this topic.

W. J. P. W.

TORT—NEGLIGENCE—ACT OF ONE PERSON—LIABILITY OF ANOTHER—AGENCY—CONTROL OF PROCEEDINGS—JOINT ENTERPRISE—DAMAGE TO PROPERTY FROM FAILURE TO TAKE CARE.

Brooke v. *Bool.* [1928] 2 K. B. 578. 97 L. J. K. B. 511.

No principle of law is varied by this case, but it does illustrate very strikingly the variety of grounds upon which liability arising out of a simple set of circumstances can be based.

The landlord of a shop where the tenant carried on business lived on adjoining premises communicating internally with the shop. The tenant had agreed that the landlord should visit the shop at night to see that all was secure. One night the landlord and a lodger of his entered the shop to search for an escape of gas from a pipe running from the ceiling to the floor. The landlord began by examining the lower part of the pipe with a naked light, and he lit the pipe at that end, but nothing startling happened. Then the lodger, a much younger man, climbed on the counter, and had hardly begun examining the upper part of the pipe, also with a naked light, when a violent explosion occurred in which the shop and goods were damaged. The tenant sued the landlord for the value of the goods.

The County Court judge found that the explosion was caused by the negligent act of Morris (the lodger) and not directly or indirectly by the defendant's negligence, and held, with grave doubts, that there was no evidence entitling him to infer that Morris acted as the defendant's agent, or to find that the defendant was responsible on any other ground.

The Divisional Court reversed this decision. Salter J. found three possible grounds for the defendant's liability. The first was agency, there

being ample evidence that Morris had acted on the defendant's implied invitation and instructions, so that the maxim *qui facit per alium facit per se* applied. Secondly, the defendant could be held responsible because the proceedings were under his control. There was abundant evidence that the plaintiff's invitation to the defendant to watch over the premises extended to the right to call in a helper in an emergency, so that Morris was there by the defendant's permission and invitation, since otherwise he would have been a trespasser, and the defendant was in control of the enterprise. The principle laid down in *Wheatley* v. *Patrick* (1837) 2 M. & W. 650, and *Samson* v. *Aitchison* [1912] A. C. 844, was applicable. In both these cases accidents had arisen from the negligent driving of a vehicle of which the defendant was an occupant and in personal control; the driver was not the defendant's agent, but had his permission to take the wheel, and the defendant was in each case held responsible for the driver's negligence. In the third place, the defendant was liable because Morris and he were acting jointly. Salter J. cited with approval from the judgment of Scrutton L.J. in *The Koursk* [1924] P. 140 (at p. 155): 'Certain classes of persons seem clearly to be "joint tortfeasors." The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and the master; two persons who agree on common action, in the course of, and to further, which one of them commits a tort.' Salter J. thought the present case fell within the third category, but it would appear to fall equally well into the first.

Again, at p. 156 of the report, Scrutton L.J. continues: 'I am of opinion that the definition in Clerk and Lindsell on Torts (7th ed.), p. 59, is much nearer the correct view: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. . . . But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action to a common end." '

Talbot J. advanced a fourth, and perhaps the most satisfactory, ground for liability. He considered the case to be covered by the general rule in *Bower* v. *Peate* (1876) 1 Q. B. 321, which is that a man who does work on or near another's property involving danger to that property, unless proper care is taken, is liable to the owner of the property for damage resulting to it from the failure to take proper care, and is equally liable if instead of doing the work himself he delegates its performance to another, however competent such person may be. But such liability does not extend to casual or collateral acts of negligence of such other person, as distinguished from negligence in the performance of the very act which the principal was under a duty to perform: *Penny* v. *Wimbledon Urban Council* [1899] 2 Q. B. 72.

In the present case Morris's negligence happened in carrying out the very work in the performance of which the defendant was, from the moment of undertaking it, under a duty to take proper care, so that the general rule applied.

W. J. P. W.

TORT—NEGLIGENCE—COLLISION BETWEEN SHIPS—REMOTENESS OF DAMAGE —NOVUS ACTUS INTERVENIENS.

Canadian Pacific Ry. Co. v. *Kelvin Shipping Co. Ltd.* (1928) 138 L. T. 369.

THE respondents' steamship *Baron Vernon* was so badly damaged by the appellants' steamship *Metagama* in the River Clyde that it was resolved to beach her on the north side of the river in what was described as position 1. Subsequently she drifted into position 2, on the south bank along the fairway of the river. The action of the tide caused her to slip into position 3 across the fairway, thus increasing the difficulty and cost of salvage. The appellants admitted initial liability for the collision, but alleged that the damages claimed were largely due to subsequent negligence on the part of the respondents. The case was on appeal to the House of Lords from an interlocutor of the Second Division of the Court of Session in Scotland, which had held the appellants liable for all the ensuing damage, thus reversing the original decision of the Lord Ordinary. The House of Lords by a majority of three to two dismissed the appeal. The dissentient judges were Lords Dunedin and Phillimore.

The point at issue was whether the respondents were negligent in not using the engines on the north bank in position 1. Discussing this point, Lord Haldane said (p. 370): 'The burden of showing that the chain of causation started by the initial injury has been broken lies on the defenders. In order to discharge this burden they must prove that the breach in the chain was due to unwarrantable action, and not merely to action on an erroneous opinion by people who have *bona fide* made a mistake while trying to do their best, which is all that is shown to have happened in the present case.' The noble Lord continued, showing how it was probable that, once the vessel was beached stern first, at high tide, on the north bank, any running of the engines, irrespective of whether the propeller was awash or on the ground (a point which the evidence failed to make completely clear), would have been of no avail, except possibly through the vibration, to shake the vessel out of its position. Accordingly, he concluded that the respondents were not guilty of negligence as regards position 1, nor, *a fortiori*, as regards positions 2 and 3, and that the appeal ought to be dismissed.

Lord Dunedin thought differently. He considered that the failure to use the engines was real negligence. The pilot and master failed to take into account that the turn of the tide was imminent. Had the engines been worked for the critical but short period when the tide turned, he considered that they would have been sufficient to keep the vessel in position, and that the non-working of the engines was negligence. He continued (p. 374): 'I am not insensible to the view that a mere error of judgment in choosing between two courses ought not to be counted negligence, but an error of judgment is one thing, supine inaction another, and the latter is what, in my view, ruled on this occasion.'

Lord Shaw, relying on the experience of the pilot and master and the evidence of several skilled witnesses, particularly the harbour-master, did not hesitate to think that to keep the engines going there was not only not a duty, but would have been a most dangerous proceeding.

According to Lord Phillimore, the failure to keep the engines running was 'a plain omission of an obvious precaution' (p. 378).

Lord Blanesburgh considered that the loss of position 1 had been invested with an importance to which it had no claim; and that the taking up of that position by the *Baron Vernon*, and its loss, had in the result no influence on the chain of causation either in fact or in law. But as that was a view of the case which had commended itself to him alone, he devoted his attention to the question discussed by the other noble and learned lords. Here he was of the opinion that the appellants had not succeeded in showing that if the engines had been kept going, there was more than a remote possibility that the *Baron Vernon* might thereby have been prevented from slipping. Accordingly, he was also in favour of dismissing the appeal.

The case was admittedly implicated chiefly with a question of fact. The principles applicable were not disputed. If A negligently puts B in a position of danger from which he may fail to extricate himself because he did not take the best course, that will not of itself disentitle B from recovering such damage as he has suffered, provided he did not act unreasonably. This has been settled again and again in what are called 'agony of the collision' cases. In such circumstances it is quite right that an error of judgment should not *ex vi termini* be regarded as negligence. The basis of dissent in the case before us seems to have been that any reasonable man would have kept the engines running. The decision of the majority and the dissent of the minority do not appear to be inconsistent with the principle embodied in Lord Sumner's metaphor in *S.S. Singleton Abbey* v. *S.S. Paludina* [1927] A. C. 16: 'The hand of the original wrongdoer was still heavy on his ship, and his own navigation was not the sole human agency determining her fortunes.' The learned editor of Salmond's Law of Torts, s. 36, sub-s. 34, has further discussion of the case here noted and the *Singleton Abbey*.

K. F.

WILL—LEGACY—SECRET TRUST.

Re Blackwell; Blackwell v. *Blackwell.* [1928] Ch. 614. (1929) 45 T. L. R. 208. 97 L. J. Ch. 257.

BY a codicil to his will the testator B gave to five of his friends £12,000 upon trust, to invest the same as they should think fit and apply the yearly income 'for the purposes indicated by me to them,' with power to pay over the capital sum of £8,000 'to such person or persons indicated by me to them with full power as they think fit,' and to pay the balance of £4,000 to the trustees of his will, to be held as part of his residuary estate. Detailed oral instructions for the carrying out of the trust were given by the testator B to C, one of the five friends, and the object of the trust was known in outline to and accepted by the other four previously to the execution of the codicil. On the same day shortly after the codicil had been executed C wrote out and signed a memorandum containing the instructions given him by B and the names of the beneficiaries. B's widow brought this action against the trustees and beneficiaries to test the validity of the trust legacy of £12,000.

On behalf of the plaintiffs it was contended that to admit C's evidence of the parol instructions given him by the testator would be to effect an evasion of the Wills Act, 1837, s. 9, which provides that 'No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned.' Evidence had been received of the testator's oral instructions only where its exclusion would have enabled the legatee to take absolutely and so to defraud the intended beneficiary: cf. *McCormick* v. *Grogan* (1869) L. R. 4 H. L. 82, at pp. 88, 89, 97. It was held, however, by Eve J. that C's evidence was admissible upon the authority of *Re Fleetwood* (1880) 15 Ch. D. 594. In that case the facts were similar, and, after examining the authorities from 1688 onwards, Hall V.-C. decided that the purposes of the trust might be proved by parol evidence; to reject such evidence would equally work a fraud on the beneficiary, for despite the known intention of the testator the trust would then result to his heir-at-law, next-of-kin, or residuary donee. The Court of Appeal upheld the decision of Eve J., the Lords Justices regarding themselves as bound by *Re Huxtable* [1902] 2 Ch. 793, where *Re Fleetwood* was approved by the Court of Appeal.

The House of Lords unanimously upheld the decision of the Court of Appeal. Lord Buckmaster said that a testator having been induced to make a gift on trust in his will in reliance on the clear promise by the trustee that such trust would be executed in favour of certain named persons, the trustee was not at liberty to suppress the evidence of the trust and thus to destroy the whole object of its creation in fraud of the beneficiaries. Viscount Sumner said that in such a case equity allows the legatee to take what the will gives him and then makes him apply it, as the Court of conscience directs, in order to give effect to the wishes of the testator. The extension of this principle to the present circumstances was logical: why should equity forbid an honest trustee to fulfil his promise? 'When Lord Cairns speaks of equity not letting the devisee set up the statute [the Wills Act] it would seem that *a fortiori* equity would not set up the statute for itself to prevent the devisee from doing what it would have itself compelled him to do if he had been negligent or dishonest in his trust' (p. 212). To make the trust result in favour of the residuary legatee is in itself the application to the will of an equitable doctrine of construction.

It seems that the law on the point may perhaps be summarized as follows: (1) Absolute gift in the will to A. Parol evidence is admissible to establish a trust affecting the property if at any time A had promised the testator that he would hold on trust: *Re Gardner* [1920] 2 Ch. 523; cf. *McCormick* v. *Grogan* (*supra*). (2) Gift in the will to A 'on trust': (*a*) If there is no designation of the beneficiaries and purposes of the trust, the trust results in favour of the residuary legatee, heir-at-law or next-of-kin, and parol evidence is not admissible. Cf. Lewin on Trusts (10th ed.), p. 65. According to Lord Buckmaster (45 T. L. R. at p. 209) this applies only where land is devised to trustees and nothing more is said, so that on the will there is a complete trust for the heir-at-law. (*b*) If, though the beneficiaries and purposes of the trust are not indicated, it is nevertheless clear on the face of the will that persons outside the will are intended to benefit, then parol evidence is admissible: *Re Blackwell*.

P. M. W.

WILL—MUTUAL WILLS—FRESH WILL AFTER ACCEPTING BENEFIT.

Gray v. *Perpetual Trustee Co. Ltd.* [1928] A. C. 391.
97 L. J. P. C. 85.

THIS case arose on appeal to the Privy Council from the High Court of Australia. The facts were as follow. In 1879 Mr. and Mrs. X drew up a post-nuptial settlement consisting entirely of the husband's property. The property was vested in trustees upon trust (1) for such persons and purposes as his wife, with his consent if living, at her discretion after his death, should by deed or will appoint, (2) for his wife for life and after her death, and in default of her appointment, (3) for such persons and purposes as he should direct, and in default and subject thereto, (4) for the husband for life, and after his death (5) for children absolutely. The point to note about the settlement is that the husband's power was subordinate to the wife's, which was paramount.

In 1914 X made a will. Under its terms all property over which he had power of appointment by virtue of the settlement was vested in trustees for sale on trust to pay the income to his wife during life, and on her death to their children. Mrs. X made an almost identical will at the same time but she expressly refrained from exercising her general powers under the settlement; nor did she make any appointment by deed.

X died in 1915 and his wife benefited under his will. In 1923 Mrs. X came to London and drew up a second will leaving everything to her daughter and appointing her sole executrix. She died shortly afterwards and administration was granted at Sydney to the respondent company, the sole trustees of the post-nuptial settlement.

The question before the Judicial Committee was whether the daughter was entitled absolutely to the whole of the property then subject to the trusts of the settlement under her mother's (1923) will, or whether the property comprised in the settlement was to be held on trust by her to give effect to the will of her father. The basis for the second proposition lay in the execution of similar and simultaneous wills by X and his wife, and in the fact that the testatrix took benefits conferred on her by her husband's will. It was argued that the existence of mutual wills and the circumstances attending their execution, debarred the wife from making a later will inconsistent with the first. *Dufour* v. *Pereira* (1769) 1 Dick. 419 was quoted as authority for implying a trust on the ground that similar wills had been made at the same time. It was suggested that Mrs. X was put to her election—she could not both approbate and reprobate her husband's will, and having taken benefit under it, she was bound to give effect to its provisions, even to the extent of renouncing her power of appointment under the settlement of 1879. But a case of election can only arise on the language of the will itself, White and Tudor (8th ed.), vol. i, p. 449; and the Judicial Committee found that there was nothing in X's will to indicate that the wife was to be put to her election.

The case resolved itself into one of fact and construction; the law on the subject of mutual wills the Court found to be quite clear and definite. When two persons have made mutual wills, one party may always revoke provided notice is given to the other if alive: *Stone* v. *Hoskins* [1905] P. 194. After the death of one party there is nothing to hinder revocation (*In the estate of Heys*; *Walker* v. *Gaskill* [1914] P. 192), but if the

survivor has taken benefit under the will of the deceased, a claim against his estate will be enforced in equity (*Dufour* v. *Pereira* (*supra*)) provided that the agreement not to revoke is proved to the satisfaction of the Court. That the similarity and simultaneity of the wills were merely evidence of such an agreement, was decided in previous cases in which the efficacy of mutual wills had to be determined (*Lord Walpole* v. *Lord Orford* (1797) 3 Ves. 402; *Re Oldham* [1925] Ch. 75); mere similarity of form does not of necessity imply any agreement beyond that so to make them. Standing alone these facts proved nothing, and could not without evidence of a positive agreement give rise to a trust in equity such as was described in *Dufour* v. *Pereira*. In this case the capital of the trust property was secured in fact by the life interest only being given to the survivor. But in *Re Oldham*, the interest created was an absolute one and might have been disposed of *inter vivos*, but the same rule applied.

The claim of the Trustee Co. failed because they were unable to prove the existence of a definite agreement between X and his wife. X's power of appointment under the settlement was defeasible not contingent, being exercisable only in default of his wife. Mrs. X, unhampered in any way by her husband's will, retained her general powers of appointment up to her death. Her will of 1923 was a good execution of the power; and even though her intention was not expressed it took effect as an execution by virtue either of the Wills, Probate, and Administration Act (N.S.W.), s. 23, or the English Wills Act, 1837, s. 27, according as to whether she had an Australian or English domicil at the time of her death.

J. T. M.

REAL PROPERTY—PRIVATE VAULT—EASEMENT.

Hoskyns-Abrahall v. *Paignton U. D. C.* [1928] Ch. 671. 97 L. J. Ch. 225.

THE plaintiff was the grantee of two grave spaces in the Paignton Cemetery, in one of which her mother was buried in 1915. In 1920 she purchased two more adjoining grave spaces, and after procuring a licence from, and paying a fee to, the burial authority, the defendant in this action, she constructed a vault on the four grave spaces, to which the coffin containing her mother's remains was removed.

Under the by-laws and regulations of the cemetery authorities, their written consent was necessary for the opening of vaults in which the exclusive right of burial had been purchased. Nevertheless the plaintiff contrived, with the connivance of the caretaker, to enter the vault at frequent intervals from 1920 to 1924, and to place therein various articles such as food, wine, vessels for flowers, aromatic gums and a table and chair. On learning of the plaintiff's visits the defendants ordered the caretaker to refuse her admission. The plaintiff continued to try to enter the vault at intervals, and the affair gained much notoriety and threatened some public disorder. Finally, in 1928 she began an action claiming a right of access to the vault for purposes of cleaning and ventilation and in order to observe the 'traditional Christian religious rites of the plaintiff's family and other Christian rites connected with the tendance of the remains of the dead.' She asserted an absolute property in the

vault, and claimed an injunction to restrain interference by the defendants, and damages.

The principle on which the case was decided was laid down by the Court of Appeal in *McGough* v. *Lancaster Burial Board* (1888) 21 Q. B. D. 323, according to which the effect of a grant under statutory authority must be determined by the power conferred on the grantor by the statute. The defendants derived their powers as a burial authority from the Public Health (Interment) Act, 1879, incorporating the Cemeteries Clauses Act, 1847. They were empowered to set aside portions of the cemetery for exclusive rights of burial, and to sell these rights in perpetuity or for a period and under such conditions as they should think fit. All the Paignton U. D. C. could sell was an exclusive right of burial and the plaintiff acquired no property rights in the grave spaces, as distinct from the materials of which the vault was constructed. Her only right was in the nature of an easement and must be exercised subject to the by-laws and regulations of the burial authorities, made under statutory power. The learned judge (Eve J.) considered that the distinctly pagan nature of the rites performed by the plaintiff, precluded her procedure from being so connected with the interment as to be covered by the grant from the burial authority; and on these grounds entered judgment for defendants. He also gave effect to a counterclaim of the defendants by making a declaration that plaintiff was not entitled to open the vault except for the purpose of interment or of executing necessary repairs; and by giving the defendants leave to apply for an injunction against the placing of any articles in the vault except those approved by the defendants.

J. T. M.

WILL—PERPETUITY—RESTRAINT AGAINST ALIENATION.

Re Chardon; Johnston v. *Davies.* [1928] Ch. 464. 97 L. J. Ch. 289.

THIS case opens up a very wide field of discussion, and the various points in question can only be briefly touched on here.

The facts are simple. A testator by his will dated in 1923 bequeathed £200 to his trustees upon trust to invest and pay the income to a cemetery company 'during such period as they shall continue to maintain and keep the graves' of named persons 'in good order and condition,' with a direction that if the graves were not so kept the trustees were to apply the income in accordance with the clauses relating to the residuary estate. The testator died in 1925, and his trustees took out a summons to determine whether the trust was valid, or whether it was void for perpetuity or otherwise.

It is apparent that three separate gifts are in question: the gift of capital to the trustees; the gift of income to the cemetery company; and the gift over to the residuary legatees. The first was clearly good irrespective of the validity of the beneficial interests created. The validity of the gift over was not discussed, but will be considered hereafter. It was argued that the second gift was bad on the ground that the duration of the interest taken rendered the property inalienable and was void as tending to a perpetuity.

Romer J. held that the whole gift was good for reasons which will appear. His judgment had one salutary effect in pointing out that the modern rule against perpetuities deals not with the duration, but with the commencement of interests. Hence the interest of the company, such as it was, was vested. He rejected the contention that the gift to the cemetery company failed on the ground of inalienability, because the company could alienate its interest to anyone who would buy, and, since the gift over was vested, the residuary legatees and the company could together deal with the whole property. But did the gift over confer a vested interest? No arguments appear to have been directed to the point, although on the construction (*infra*) which Romer J. placed on the nature of the company's interest it is submitted that he was correct. As, however, his *dicta* have caused some doubts, it is, perhaps, desirable to discuss the point as fully as space will permit. Had the bequest to the cemetery company been one *on condition* that they kept the tombs in the necessary state of repair, it is submitted that the gift over would have been contingent only and therefore void, for it would not have been ready to take effect until the fulfilment of the condition, *viz.* failure to keep the graves in repair, which might have been after a longer period than that allowed by the rule. Consequently the residuary legatees, having only contingent interests, could not join with the company to dispose of the absolute interest in the property. The failure of the gift over would then have raised the question of the resultant position of the previous gift: would this have remained good? It is submitted that the answer should be 'no,' and that the gift would become void as creating a perpetuity: *Re Clifford* [1912] 81 L. J. Ch. 220; *Re Drummond* [1914] 2 Ch. 90. These cases are distinguishable from *Re Chardon*, as, in them, the first limitation seems to have been one on condition; but the bequest to the cemetery company was not one on condition, it was a conditional limitation, and the distinction, though highly artificial, is of the greatest importance. A conditional limitation is a form of words creating an estate or interest, and denotes its extent by designating the event upon which it is to commence and the time of its duration. The sole object of the terminating provision is to indicate the extent of the previous grant. But in a limitation upon condition the terminating condition operates in defeasance of a previous grant; it does not create an estate, but avoids it. The limitation in this case was of the former kind—a gift 'during such period as they shall continue to maintain,' etc. The terminating event is incorporated in and forms part of the limitation. Romer J. pointed out that the gift was analogous to a determinable fee, and that, whatever the status of determinable fees since Quia Emptores, the statute did not affect personalty. The importance of this distinction lies in the fact that an interest upon condition is subject to the rule against perpetuities (*Re Hollis' Hospital* [1899] 2 Ch. 540); whereas a determinable interest is not: see Lewin on the Law of Perpetuity, p. 173. Consequently, in the present case, the interest of the cemetery company being analogous to a determinable fee, its duration was immaterial. If this analogy is accepted, the gift over was good, for although no *legal* remainder could be limited upon a determinable fee (see Challis, Real Property (3rd ed.), p. 83) this does not apply to an interest taking effect under a settlement. Common instances are the protective trust and the strict settlement of land, where the property to be brought in is limited to the settlor 'until the solemnization of the said intended marriage' with the usual limitations over.

On the basis of the fact that the wording of the gift created a determinable interest and not one upon condition, *Re Chardon* may, perhaps, be reconciled with the earlier cases which decided that a non-charitable trust for the maintenance of a tomb could only be created by a gift to a charity upon condition that it kept the tomb in repair, with a gift over to another charity in default: see *Re Tyler* [1891] 3 Ch. 292. Since *Re Chardon* it will apparently be possible to create such a trust by vesting the gift in such a way that the maintaining body is only entitled to the income *so long* as they maintain the tomb.

J. A. P.

WILL—UNCERTAINTY—PERPETUITY.

Re Villar; Public Trustee v. *Villar.* [1928] Ch. 471. [1929] 1 Ch. 243. 97 L. J. Ch. 230.

THE rule against perpetuities provides that every future interest in property real or personal (with certain exceptions) is void unless it must vest (if it vest at all) within any number of existing lives and twenty-one years after, with a few extra months for gestation where it actually exists: *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372.

Re Villar establishes no new principle of law, but illustrates in interesting circumstances a qualification of the above rule, namely that the dropping of the selected lives must be ascertainable by ordinary legal testimony: see Lord Eldon's judgment in *Thellusson* v. *Woodford* (1805) 11 Ves. 112, 146-147.

A testator by his will made in 1921 appointed the Public Trustee, and, in the events that happened, his son Arthur, executors and trustees, and devised and bequeathed property to them on certain trusts as to income and capital for his participating issue as therein defined, postponing the vesting of the capital until 'the period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of Her late Majesty Queen Victoria who shall be living at the time of my death.'

The testator died in 1926, and the Public Trustee issued a summons to determine whether the trusts were void for uncertainty.

The limitation clearly did not infringe the rule against perpetuities, for only existing lives were selected, but it was argued that the lives of Queen Victoria's descendants were not in fact lives to which testimony could be applied to determine the dropping of the survivor of them, and consequently the gift to the participating issue was void, as it was almost impracticable to ascertain the time of vesting. It was proved that in 1922 there were about 120 descendants of Queen Victoria living, and that it would involve enormous trouble and expense in keeping trace of these people, and ascertaining the death of the survivor, an event which might not occur until the end of this century.

Astbury J., however, with great reluctance, upheld the trust. He pointed out that a trust is only bad if it is substantially impracticable to ascertain the extinction of selected lives, and that it was not proper to take into account merely possible difficulties. His judgment was affirmed by the Court of Appeal.

A case in which the uncertainty of the selected lives made it impossible to ascertain when the gift over took effect is that of *Re Moore* [1901] 1 Ch. 936. There a testatrix bequeathed £500 to trustees to be applied in keeping up a tomb until the expiration of twenty-one years from the death of the survivor of the entire inhabitants of the globe living at her death. The postponement of the vesting of contingent interests by reference to the lives of living descendants of Queen Victoria or Edward VII is common form. It arose from the fact that the death of a member of so distinguished a class was notorious. The circumstances of the Great War have rendered the common form clause far less efficacious than it formerly was, for since the German Revolution of 1918 some of Queen Victoria's descendants have become private persons. Moreover, the fate of some of the children of the late Tsarina is not entirely free from doubt, and it may very well be argued that the time has come to alter the law. At present the vesting of the future interest is a matter of chance; the lives selected may be exceptionally long or exceptionally short, and the position is quite illogical. It has been suggested that the 'life or lives in being' should be confined to those of persons taking interests under the settlement in the settled property, as was formerly the case. Further, the term of twenty-one years which may be added to the selected lives is an absolute term, and need have no reference to the minority of any person to become entitled under the settlement.

Any proposed alteration of the rule might well extend to remedy this further anomaly.

J. A. P.

BOOK REVIEWS.

Les Aspects Économiques du Droit de Prise. Par Jacques Dumas, Docteur en droit, Avocat-Général près le Cour d'Appel de Paris, Membre Associé de l'Institut de Droit International. Tomes I et II. Paris: Recueil Sirey. 1926.

Dr. Dumas's work falls into two completely separate volumes. The first, which was in the press on the eve of war, is a reasoned and well-supported argument on familiar lines in favour of the thesis that war on trade, as such, is never a decisive weapon, and always an over-expensive one. In view of insurance, the anonymity of companies, trusts, etc., it is hard to say who will, even directly, sustain the blow; and, indirectly, the repercussion must fall on the captor, since trade is two-sided, and the stoppage of an import to the enemy means the stoppage of an export to him, and *vice versa*. If the trade is between belligerents (as was pointed out by this reviewer in 'War and its Legal Results'), to stop it is to prevent ourselves from getting what we want in exchange for what we do not want—the real reason why it is penalized is found in the facilities such trade affords for treasonable conversation. If the trade is between belligerent and neutral, to stop it is to make the neutral less capable of trading with ourselves. Such is the argument, and it is worked out with much force and with a copious amount of illustration.

The events of the war revolutionized the situation. The Entente Powers not only seized enemy property in spite of the Declaration of Paris, but they went far towards forbidding all trade with the enemy, by a free extension of the list of contraband, and a lavish employment of the 'continuous voyage' theory. In the same fashion that Great Britain had unsuccessfully attempted to proceed in 1793, they saw in their adversary nothing but a huge barrack, all supplies to which were equally capable of contributing to his resistance. Dr. Dumas devotes his second volume to the examination of the new situation so created: and he is obliged to admit that as a factor in such a wholesale stranglehold, the capture of private property may have a decided influence on the military situation. He is still firm, however, in his opinion that attacks on trade, merely as such, are useless and extravagant, and he brings much evidence in support of that opinion. Even as a military measure, he thinks the matter still an arguable one. In 1917, in spite of the German submarines, France, England and Italy were severally importing more grain and ham from America (if less sugar) than in 1914—not only in value, but in quantity. It is difficult to reconcile this with the strict rationing which was then enforced (the explanation may be partly that the exports of corn from America ought to have been much greater, the Russian supply having failed). And there can be no doubt that the weakening of the vitality of the German people, due to the Entente action, was a potent cause of the military *débacle* of the Central Powers.

A certain unreality attaches at the present day to the whole discussion; because it is not now the capture of enemy goods which is really at all important, but the attempt under colour of contraband capture to starve the enemy out and to deprive him of necessities of war and sustenance. The author sees that a wide extension of contraband would swallow up any formal exemption of enemy private property, and in the end he opposes the whole idea of occasional contraband: but at the same time he is full of excuses for the successive extensions of contraband which were perpetrated by the Entente Powers. Germany, he thinks, could not complain of them, because of her own multifarious misdeeds: neutrals could not, because they could not prevent Germany from committing them. It is obvious that this reasoning would permit any barbarity and any injustice; and we are frankly sorry that Dr. Dumas devotes so much of his space to the attempt. It has really no bearing on his main subject, and it has an unpleasant air of special pleading. If we start from the premise that Germany must always be wrong, we shall even then be unable to accept all Dr. Dumas's conclusions against neutrals, and we may as well substitute in our books for the law of prize the law of reprisals.

Tribute must be paid to the careful fashion in which the author has examined the subject from every point of view. Dr. Dumas deals very clearly and skilfully with the so-called 'blockade,' and asks why a regular blockade was not proclaimed—the answer to which is that it would have been impossible to blockade the Baltic ports. The effects of blockade, contraband, submarine warfare, insurance and kindred problems are all carefully analyzed. The author, who is Advocate-General in the Court of Appeal at Paris, must be congratulated on producing an excellent and workmanlike treatise, the only defect in which we have characterized as a gratuitous and gallant attempt to justify the Entente proceedings at the expense of his own propositions.

T. B.

A History of Italian Law. By Carlo Calisse, Professor of Law in the University of Rome. Translated by Layton B. Register, Lecturer on Law in the University of Pennsylvania. With Introductions by Frederick Parker Walton, formerly Director of the Khedivial School of Law, Cairo, and Hessel E. Yntema, Professor of Law in Columbia University. Vol. VIII in the Continental Legal History Series, published under the auspices of the Association of American Law Schools. Boston: Little, Brown & Company. 1928. lix and 827 pp.

To all students of English and American legal history this new volume in the 'Continental Legal History Series' will be most welcome. The historical relations between Continental laws and English law (as well as all systems, such as those of the American States, based upon English law) are much closer than scholars at one time thought. The cultivation of studies in legal history since the time of Eichhorn and Savigny has gradually disclosed the historical ties which connect the Anglo-American systems of law with those on the Continent of Europe. As the editors of the 'Continental Legal History Series' have remarked: The 'seamless web of our own legal history unites us inseparably to the history of Western and Southern Europe' (p. ix). To understand the course of English legal history it is in fact indispensable to grasp the main features of the history of at least four Continental bodies of law, those of Germany, France, Italy, and Spain. By bringing the history of Italian law within the reach of all English and American students, the Association of American Law Schools has performed, therefore, a valuable service. The present volume, composed of translations of portions of Professor Calisse's standard work on Italian legal history, with fresh additions from his pen and that of the learned editor and translator, should prove to be a vital force in the scientific study of the historical links between Italian law and English law.

The volume contains three books dealing respectively with public, criminal, and private law. Both the public and the criminal law are treated according to historical periods, while in the case of the private law this method has been abandoned in favour of a systematical method based on the several branches of the law. In Book I (pp. 1—215), dealing with public law, the historical periods considered are the Byzantine period (A.D. 476—568), the Germanic period (A.D. 568—1100), the Renaissance (A.D. 1100—1789), and modern times (A.D. 1789—1922). The constitution and administration of the State and the relations of State and Church form the main subject-matter of Book I; and this subject-matter is not only important in itself, but valuable as an introduction to Books II and III. Book II (pp. 216—448), concerned with criminal law, deals successively with the period of Germanic domination, the neo-Roman period, the philosophic period (down to the present day). Under the period of Germanic domination the main subjects are the crime, the penalty, and the several kinds of crimes; while for the neo-Roman period the principal topics are (a) the general qualities of crime and penalty and (b) particular penalties and crimes. In the philosophic period we are introduced to the new penalists, including Beccaria, Renazzi, Filangieri, and Romagnosi, informed as to the reform of the criminal

law in the eighteenth and nineteenth centuries, and, finally, given an excellent account of criminal science and codification in the period of the restoration governments and united Italy. In Book III (pp. 492—804), upon private law, the main parts are devoted to persons, the family, decedents' estates, property rights, obligations, and private law since the unification of Italy.

The vast range of the volume is thus indicated. Many of the topics embraced within it will be fascinating and instructive reading to all who look upon law as an integral, indeed a basic, part of the history of civilization. Moreover, to the student of comparative legal history the rich materials furnished by this volume will be examined with special interest. He will have a sound basis for comparing many aspects of institutional and legal growth in Italy with similar features in the history of France, Germany, Spain, and England; as, for example, the feudal state, the administration of justice, crime and penalty, the juristic person, marriage, intestate and testate succession, ownership and possession of property, and contract. With a knowledge of the leading factors in legal development in Italy he will be able to contrast also certain of the broader influences upon the law of Italy and other legal regions of Europe. Thus, for example, he will have a solid foundation for a study of Germanic and Romanic influences upon the laws of Europe; he will note the effect of the rise of canon law on secular bodies of law; he will observe the progress of juristic studies of law and the embodiment of theories in judge-made law and codifications.

One welcomes in Mr. Register's editorial preface an account of Professor Calisse's distinguished career as a legal historian and in public life, as well as a list of his writings (pp. xxxix—xli). The Introductions by Mr. Walton and Professor Yntema not only emphasize the value of the volume, but place its reader in the historical atmosphere of Italian law. Finally, the importance of Mr. Register's labours should be stressed. His translation of Professor Calisse's *Storia del Diritto italiano* is faithful and lucid; his editorial work is excellent; his own contribution to the historical matter of the volume is of much value.

H. D. H.

Juristische Bücherkunde. Eine Einführung in die Bibliographische Technik und in den Bibliographischen Apparat der Rechts-, Staats- und Ihrer Hilfswissenschaften. Dritte Auflage. Von Dr. Jur. Wilhelm Fuchs, Bibliotheksrat an der Universitätsbibliothek zu Göttingen. Linz a. Donau: Franz Winkler, Verlag 'im Buchladen.' 1928. vii and 244 pp. (M.10.)

Mr. Edward M. Borchard has rightly observed, in his *Guide to International and Continental Law*, that the first step in scientific study is the mastery of bibliography. Dr. Fuchs's main purpose, in presenting this third and enlarged edition of his *Juristische Bücherkunde*, is to enable the beginner in legal science to take this first step: the mastery of the bibliographical apparatus which will guide him in his researches within the vast literature of the law. The learned author and compiler aims, in fact, to equip the novice for his lonely voyage on the *oceanus iuris*. It is

no part of Dr. Fuchs's intention that he should himself accompany the voyager: he places the bibliographies, the books about books, in the hands of the youthful skipper and bids him *bon voyage*. The mariner must steer his own course and see to it that he arrives safely in his desired harbour.

Dr. Fuchs has divided his introduction to legal bibliography into four main parts. In the first part he deals with *praktische Bücherkunde* (pp. 1-82); in the second part he sketches the history of the art and science of preparing legal bibliographies in the sixteenth, seventeenth, and eighteenth centuries, and glances at the development of the nineteenth and twentieth centuries (pp. 83-110); in the third part he provides the jurist with a *Handbibliothek*, a bibliographical manual (pp. 111-198). After several pages of additions to these three parts (pp. 193-210) Dr. Fuchs sets out, as his fourth part, an alphabetical register of the matters included in the book (pp. 211-244).

The sixteenth century, the main century of the Renaissance, which was so momentous in the history of European law and legal science, witnessed also the beginnings of legal bibliography in the West. The earliest published bibliography of this character, Dr. Fuchs tells us (p. 85), was the *Inventarium* of legal books prepared by Joannes Nevizanus (Giovanni Nevizani), which issued from the press at Lyons in 1522; while in 1525 there was published at Venice a new and enlarged edition of this work under the editorial care of a Spanish scholar, Ludovicus Gomessius (Gomez). Dr. Fuchs's account of the labours of these early legal bibliographers and of their successors in later times is of much interest: it provides information which should be a part of the intellectual equipment of every jurist (pp. 83-110). When the legal researcher stops to realize the difficulties incident to the composition of truly scientific legal bibliographies, he will appreciate the remarks of Konrad Maurer, the master of investigation in Northern legal history, on the subject of bibliographical works (see p. v); and he will not be surprised to find that some of the cherished names in the history of legal bibliography are those of distinguished scholars who, by their unselfish labour in this field, have advanced the cause of legal learning. Followers of Nevizanus and Gomez in the sixteenth century were Ficard and Freymon, both Germans, and Zilettus, an Italian: and Dr. Fuchs characterizes the work of these five men by remarking that 'die juristischen Fachbibliographien des 16. Jahrhunderts sind sämtlich Gelehrtenarbeit.' Distinguished as legal bibliographers in the seventeenth century were Lipenius, a German scholar, and Fontana, an Italian; while in the eighteenth century Struve and Beyer were prominent.

In addition to providing bibliographies of national legal sources and literature and of the separate branches of the law, the sixteenth, seventeenth and eighteenth centuries had shown a marked tendency to produce bibliographical works comprehensive in scope, works which embraced the legal materials of all the leading countries of the world and of the society of nations. In the nineteenth century this tendency, owing possibly to the emphasis then placed on national laws and their history within the domain of legal studies, was far less marked. But, as Dr. Fuchs remarks, 'die Entwickelung im 20. Jahrhundert, soweit es sich bisher übersehen lässt, zeigt wieder eine deutliche Tendenz universellerer Bestrebung im Gebiete der Rechtswissenschaft' (p. 110). This present tendency to universality in legal science, evidenced in part by marked attention to

studies in comparative law and comparative legal history, may well result in time in a definite return to the comprehensive bibliographies of the earlier scholars who devoted themselves to this form of scientific work. Up to the present day, however, concludes Dr. Fuchs, the main care of twentieth-century scholars has been the production of bibliographies that are national in character. It is his judgment that in the national teaching of legal bibliography America is now the leader; and, also, that the most important national legal bibliographies that have appeared since 1900 are in the English and French languages (p. 110).

Observing that one of the main lessons to be gained from a perusal of Dr. Fuchs's interesting pages on the history of legal bibliography is that the character of books about books is conditioned by the social, political, and juristic tendencies of the time, one must now hasten to remark that the practical parts of Dr. Fuchs's work will be of much value not only to law librarians, but also to legal historians and comparative jurists. Beginners, advanced students, and even trained scholars will find their researches furthered by the use of a book that has been prepared by a jurist who, overstepping national boundaries, aims at that universality which was a distinguishing mark of some of the legal bibliographies composed by the earlier masters. Since it includes references to many of the legal materials of the leading countries of the Western world, Dr. Fuchs's *Juristische Bücherkunde* will naturally find a place on the study shelves of every student who concerns himself with the comparison of present-day laws; and indeed to such a student this book will make perhaps, its chief appeal.

H. D. H.

Studies in International Law and Relations. By A. Pearce Higgins, C.B.E., K.C., LL.D., Whewell Professor of International Law in the University of Cambridge; Fellow of Trinity College and Hon. Fellow of Downing College, Cambridge; Membre de l'Institut de Droit International. Cambridge: University Press. 1928. viii and 314 pp. (15*s*.)

All students of international law and relations will welcome this collection of twenty studies from the pen of the Whewell Professor. Although many of these essays, lectures, addresses, and papers had already been published in legal and other periodicals, they appear in their present form as revised, or in some cases re-written, by the author. The whole volume bears the stamp of Dr. Pearce Higgins' extensive knowledge, thorough research, high standard of scientific accuracy, and devotion to the cultivation of fruitful studies in the history, principles, and growth of the law of nations. The style is both succinct and lucid; the matter instructive and valuable. The volume is, in fact, a scholarly and most useful addition to our knowledge of several aspects of the important subject to which Dr. Higgins has devoted his life. The book will be read with great profit not only by all students of international law and diplomacy, but also by public men and general readers who desire to acquaint themselves with vital features of international relations and international law.

In the first three chapters (pp. 1—45), which are closely related to

one another, the author deals with the subject of the interdependence of international relations and international law; and, among other things, he stresses, and rightly stresses, the need for placing a greater emphasis on the duties, as distinguished from the rights, of states. 'Duties first, rights after; the fulfilment by states of the former before the enjoyment of the latter can be claimed is the great desideratum' (p. 44): this, declares Dr. Higgins, is the position which, in any presentation of the fundamentals of international law, should appear with greater emphasis and clearness (p. 45). In the next succeeding chapters (pp. 46—103) the position of the Papacy is examined from the point of view of international law, the history of the Monroe Doctrine down to the present day is sketched, and the work of Grotius and of the modern international lawyer is considered.

In the course of his illuminating discussion of the question whether the Pope has an international legal personality, the author holds, with Geffcken, that 'the Papacy is a unique phenomenon in history' (p. 62). 'The Pope ceased in 1870 to be a temporal sovereign' (p. 59). 'If the Pope is not an international person apart from the Italian Law of Guarantees,' Dr. Higgins contends, 'that statute does not make him one' (p. 57). 'The Papacy refuses to fall into any tabulated arrangement of states or sovereignties' (p. 62). It does not rank with temporal powers (p. 58): the position of the Papacy is, in fact, 'exceptional' (p. 46) and 'anomalous' in its relations with temporal powers (p. 65). Although the Pope is a 'sovereign Pontiff' who enters into personal relations with states (p. 61), he is not invested with an international personality and is not a member of the international state society (see p. 57). Dr. Higgins' arguments in support of these views are a brief but enlightening contribution to jurisprudential theory.

The recent agreements between the Papacy and Italy—the Lateran Treaty, the Concordat, and the Convention—have in some respects transformed Dr. Higgins' essay into a contribution to legal history. By force of these three instruments, but more particularly of the treaty, there has been created in the heart of Rome the 'State of the Vatican City,' a small territorial state of which the dominion and sovereignty are vested in the Holy See (see *The Times*, February 12 and 13, 1929). While the full scope of the new position of the Papacy in international law and relations cannot as yet be foreseen, it is clear that, from the standpoint of actual law and practice, as distinct from history, Dr. Higgins will need to amend his essay in any future edition.

The comparison of the work of Grotius as an international lawyer in the first half of the seventeenth century with the work of the international lawyer of to-day (pp. 86—103) shows the value of contrasting two important periods in the history of the growth of international law. The 'work of the international lawyer of to-day,' concludes Dr. Higgins, 'is in the first place to use the large amount of material to his hand, to expound it and commend it to the instincts of reason, justice, and humanity of states; and secondly, where rules are uncertain or lacking, to propose those which will enable states in their modern complex social relations to fulfil their highest ends' (p. 103). 'The appeal of Grotius was to the rulers of his day,' while 'the appeal of the international jurist to-day is less to individual rulers, and more to the various group interests which ultimately control the destinies of states' (p. 95).

In the later portions of the volume (pp. 104—304) Professor Higgins

deals more particularly with the war of 1914 and some of the great legal problems which emerged during the war or which have occupied the attention of states and jurists since the war. His treatment embraces the following topics:—'The Law of Nations and the War of 1914' (pp. 124—152), 'Enemy Ships in Port at the Outbreak of War' (pp. 153—185), 'Submarine Cables in Time of War' (pp. 186—201), 'Ships of War as Prize' (pp. 202—212), 'Retaliation in Naval Warfare' (pp. 213—238), 'Defensively Armed Merchant Ships' (pp. 239—295), and finally, although it appears in an earlier part of the volume, 'The Locarno Treaties' (pp. 104—123).

Remarking merely that it is useful to have the legal and political aspects of the Locarno Treaties set forth so clearly, special mention should be made of those studies which deal with the rules and principles of maritime warfare. Dr. Higgins, who has been for many years the lecturer on international law at the Royal Naval War and Staff Colleges, is universally recognized as ranking among the foremost authorities on all questions concerned with war at sea. Certain of the studies in this volume constitute a most important contribution to our knowledge of the law of naval warfare; and they must of necessity be consulted by all future students of the principles and problems with which they deal. While it is impossible in the present place to consider these studies in detail, attention may be drawn to the six suggestions which Dr. Higgins makes at the end of his essay on 'Retaliation in Naval Warfare' (see pp. 237-8): in making these suggestions, the learned Professor is performing that statesmanlike function which he claims as one of the prerogatives of the modern international lawyer (see p. 103). It may also be pointed out that at the end of his extended examination of the subject he expresses the view that 'from the standpoint of international law the legality of defensively arming merchant ships as aids to their legitimate resistance to capture appears established' (p. 295). Dr. Higgins views this expedient, however, as a 'regrettable necessity.' 'Everything,' he says, 'which tends to obliterate in any way the line between combatants and non-combatants and which may produce a return to the days of privateering is a retrogression' (p. 295). The Whewell Professor hopes that international co-operation may overcome the dangers which led to the arming of merchant ships in 1913.

H. D. H.

Cases in Constitutional Law. By D. L. Keir, M.A., Fellow of University College, Oxford, and F. H. Lawson, M.A., of Gray's Inn, Barrister-at-Law, and Fellow of Merton College, Oxford. 1928. Clarendon Press (Humphrey Milford). xxvii and 479 pp. (25*s*.)

Students of the Constitution have reason to be grateful for this collection of cases. The selection is admirable; the chapters which precede each of the twelve groups of subjects contain essential matter, much of which is not available for the Tripos candidate in the textbooks. The majority of the sixty-four cases selected are modern; only twelve are more than a century old: in this respect the book meets the need of those teachers who, while anxious to continue the use of Dicey's classic exposition

on the Constitution, find themselves under the necessity of correcting and modifying the views of the author on the rule of law. To some extent these chapters supply the deficiency caused by the absence of a new edition of Anson's volumes on the Crown.

Chapter V, The Judicial Control of Public Authorities, is one of the important features of the collection; it is appropriately followed by Remedies Against the Crown and its Servants. Even the general public, at all events that portion of the public which is represented by chambers of commerce and trade organizations, are awakening to the sense of grievance arising from the immunity of process which the departments of state enjoy. The authors, in discussing the available means of judicial control over those who are charged with making, administering and adjudicating upon ministerial law, emphasize two important points with which the older writers scarcely deal. The first is the changed nature of the functions of the state; this may be summed up by the following passage (p. 125): 'In the modern State a continuous process of adjustment goes on between the claims of the community and the private rights of its members. . . . It cannot be left entirely to the will of the private person to say whether he consents to the abridgment of his rights . . . neither can it be left entirely to the will of administrative organs, for this would be to reproduce all the characteristics of a despotism, and there is no guarantee that a despotism will always remain enlightened.'

In the second place the Courts will not interfere with the actual exercise of a discretion entrusted to an administrator; this would be to substitute their own discretion for that of the body which has been expressly appointed by Parliament to decide. They can only insist on the discretion being exercised, and that the limits of jurisdiction be not exceeded. 'It is not the business of the Courts either to enforce a policy or to supervise the details of administration' (p. 140). Emphasis is laid on the weakness of the system which tends to allow a bureaucrat engaged in carrying out a policy to be in the position of a person who is judge in his own cause. *Audi alteram partem* is apt to be meaningless if the judge declines to allow the argument he has heard to affect his decision in a matter in which he is himself interested.

Two other chapters deserve special mention—Martial Law and the Overseas Dominions of the Crown. We doubt, however, whether it is permissible to say to-day of the Dominions that the necessity for ministerial responsibility is not legal but political, for the reason that its operation could be frustrated by the decision of the 'Imperial' Parliament—a term which in itself we should have been disposed to avoid. Even with the authors' subsequent qualification of their statement we incline to the opinion that the convention of non-interference is now absolute, even in the case of Canada, where the form of amendment by 'Imperial' statute is preserved.

Those critics of administrative law who assailed the Government last year for their attempt to obtain statutory authority for taking advisory opinions from the judges to assist the executive in administering uniformly the recent rating reforms, will read with interest (at pp. 444 *seq.*) *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada* [1912] A. C. 571. The Judicial Committee declined to regard with 'intensive abhorrence' the putting of questions to a Court of law otherwise than by litigation.

We have noted but two misprints—p. 344, l. 10, 'so' for 'no'; and p. 394, l. 9, 'net' for 'neat.' There is an error on p. 77, where it is

stated that the privileged occasion discussed in *Wason* v. *Walter* (1868) L. R. 4 Q. B. 73 was an *absolute* one; as the report of the case shows (at p. 115) the privilege is qualified and may be rebutted by proof of malice. Lastly, a hope may be permitted that delegated legislation may receive even fuller treatment when the demand for a second edition arises. This should be at no distant date.

We would ask the publishers to consider a reduction of the price (25*s.*), so that the book may find its way to the bookshelves of every honours student in law.

E. C. S. W.

The Development of International Law. By Sir Geoffrey Butler, K.B.E., M.P., M.A., and Simon Maccoby, M.A. London: Longmans, Green & Co., Ltd. 1928. xxxv and 566 pp. (25*s.*)

An English book on the history of international law has been long overdue. Henry Wheaton's *History of the Law of Nations* was published in 1845, and the first volume of Dr. T. A. Walker's work, bearing the same title, appeared in 1899; it did not carry matters further than 1648, and the learned author has unfortunately been too busy in other directions to fulfil his hopes of completing the second volume. And that was all that existed on the topic, or at least all worth consideration, for John Hosack's *Rise and Growth of the Law of Nations* (1882) was slender and formless, and Robert Ward's *History of the Law of Nations in Europe* (1795) was incomplete and hopelessly out of date. Thus, the learned authors of the book before us had a fair field so far as English competitors were concerned. In point of substance (we say nothing for the moment of form) they are much to be congratulated. It would be unwise to recommend a student to read their work until he has read at least one elementary book on current international law, for a good many of the legal ideas in it are taken for granted here; *e.g.* it would be difficult for a beginner to understand what are the various meanings of Intervention by merely reading pp. 69—73, and indeed no hint appears there that one of its significations is highly peculiar and quite distinct from the other two. But, assuming some knowledge of the existing law, every one ought to read Part I (to mention no other) for its admirable exposition of the leading ideas prevalent in a European society where the modern law of nations was yet unborn. No better tribute can be paid to the mode in which this is handled than to say that lawyers who have paid little attention to the history of the subject will be able at once to realize what an important part was played by matters which the pure legist of to-day would impatiently and contemptuously reject as irrelevant. Maine urged that Austin's 'jurisprudence' had at least the merit of clearing one's head. No doubt it has, but the parable of the house swept and garnished applies to a good deal of what Austin's analysis of sovereignty might do for anyone who took it in without qualification for the purpose of clearing his head, and the development of mediæval notions of supreme power by the authors is an excellent corrective for assuming that they were at all like more recent conceptions of it. Again, Part III (The Age of the Concert) ought to be absorbed by every lawyer interested in the League

of Nations. Sir Geoffrey Butler's work on behalf of the League in other directions, and his opportunities for seeing so much of its operation, make him peculiarly competent, quite apart from his well-known abilities as an historian, to trace what has led up to it; and here, as elsewhere, he acknowledges the capable help of Mr. Maccoby in collecting materials.

The form of the book is not quite so satisfactory as is its substance, but we do not wish to press criticism on what is a secondary, and almost invariably troublesome, affair. Three major and (we gather) successive periods are selected, those of 'the Prince,' of 'the Judge,' and of 'the Concert.' The first is the age of the dissolving Holy Roman Empire, the second is that of commercial and dynastic wars, the third is that of the reassertion of some force other than that of pure nationalism. The first and third heads, as such, are well-chosen, but the title of the second is scarcely so convincing. What is more puzzling is the allotment of some topics to one particular department or even to more than one. Why should 'air forces' be considered under 'the Prince'? More intelligibly, 'war in the air' appears again, at p. 423, under the Hague Conference, 1907, but this is not even indexed under 'Air.' Further, the three divisions are presumptively cross-sections through history, whereas in fact the first at any rate appears to be split along the grain as well, for the development of various institutions is carried right through to law of the present day. A little more explanation in the preface would help here, and the book is so valuable that we shall be greatly surprised if the authors do not get an opportunity of making it in a second edition.

P. H. W.

Lewin's Practical Treatise on the Law of Trusts. Thirteenth edition. By Walter Banks, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Limited. 1928. ccviii and 1481 pp. (£3 5*s*.)

Owing to the fact that sixteen years have elapsed since the last edition of this standard work was published, the profession will be grateful to the learned editor for the labour and care he has spent in bringing it up to date, namely, November, 1927. Since vast changes have taken place in the law of trusts, due to the mass of new legislation and recent decisions, the editor has entirely recast the text and in many parts re-written it. He has, moreover, added an entirely new part dealing with trusts and settlements of land (pp. 1015—1293); while, to other portions of the volume, he has also contributed ten sections which are entirely new, for example, those on the enforcement of equitable interests and on infant beneficiaries after 1925. The authorities in this edition are noted up to, and including, the July, 1927, number of the Law Reports, while references to cases reported while the book was in press—including *Re Parker's Settled Estates*—are to be found in the Addenda (pp. cci—ccviii). The Table of Statutes (pp. xv—xxvii), Table of Cases (pp. xxix—cc), and Index (pp. 1341—1481) have all been carefully compiled.

While it is obviously impossible, within the compass of a brief review, to consider in detail the mass of material contained in this huge volume of nearly seventeen hundred pages, it may be remarked that, so far as it has been possible for present purposes to test the scholarship of the

book, the editor's work has been accomplished with skill, learning, accuracy, and precision. In all parts of the volume the new statute and case law of property has received adequate treatment; and, indeed, the results of the editor's study of the new law as embodied in this book constitute a notable contribution to the ever-increasing literature dealing with the Property Acts and their judicial interpretation.

Members of the profession will take special interest in the editor's largest addition to the book, namely, the part dealing with trusts and settlements of land (pp. 1015—1293). In regard to the new statutory definition of 'trust for sale,' the editor contributes some useful comments. He adverts to the point that 'in the Property Acts of 1925, unless the context otherwise requires, the expression "trust for sale" in relation to land, means an immediate *binding* trust for sale' (p. 1048); and he remarks that 'it was the decision in *Re Leigh's Settled Estates* [1926] Ch. 852 which first directed attention to the new statutory definition of "trust for sale" and to the questions raised by the use of the word "binding"' (p. 1049).

The editor remarks further that, although the attention of the Court of Appeal was drawn in the course of argument, in *Re Ryder and Steadman's Contract* [1927] 2 Ch. 62 (C. A.), to the definition of 'binding trust for sale' given in *Re Leigh's Settled Estates*, no express reference was made to it in the judgments delivered; and he 'conceives that the meaning given to the word "binding" in the earlier case was not adopted in the latter case, for he is quite unable to reconcile the two decisions' (p. 1049). In his elaboration of this point the editor's own views of the meaning of 'binding' are of much interest (see pp. 1050—1051); and in his note on *Re Parker's Settled Estates* [1927] W. N. 322; [1928] Ch. 247 he returns to the subject (pp. ccv—ccviii). He draws attention to the point that in this latter case Romer J., as a result of his consideration of all the Acts, said that he preferred to treat the word 'binding' as mere surplusage inserted *ex maiore cautela* rather than give to it a meaning that would exclude from being trusts for sale innumerable trusts which are indubitably trusts for sale as that phrase has always been understood by lawyers hitherto (p. ccv). In his general conclusion on the whole matter, the editor writes as follows:—'The mystery as to the meaning of the words "trust for sale" has not yet been solved, and the cases decided since the new Acts came into operation are not very helpful in furnishing a general guide, for they appear to be somewhat conflicting and not easy to reconcile. If the observations of Sargant L.J., in *Ryder and Steadman's Contract*, together with those of Romer J., in *Re Parker's Settled Estates*, are eventually followed to a logical conclusion, some problems arising under the new Acts would be solved' (pp. ccvii). The editor mentions some of the solutions which, in his judgment, would result (p. ccviii). In general, it may be remarked that his whole treatment of the problem as to the definition of 'trust for sale' is marked by clarity and sound reasoning.

Practitioners will find it indispensable to consult Mr. Bank's edition of Lewin's classic; and teachers of law will derive much help from a perusal of its pages. Although most law students will naturally rely on shorter works, those who are somewhat advanced in their reading will profit from an examination of certain selected portions of the new Lewin, as, for example, those upon the rise and progress of trusts (pp. 1—9), the definition of a trust (pp. 11—14), the classification of trusts

(pp. 14—16), how a trust may be declared (pp. 44—73), the creation of trusts by operation of law (pp. 157—210), the properties of equitable interests (pp. 678—772), and the like.

H. D. H.

English Constitutional Conflicts of the Seventeenth Century, 1603—1689. By J. R. Tanner, Litt.D., Fellow and formerly Tutor of St. John's College, Cambridge. Cambridge University Press. 1928. x and 315 pp. (15*s.*)

Dr. Tanner's new work supplies a long-felt need for a book which emphasizes the constitutional aspect of this century of historical evolution. It presents the story of the concentrated and persistent struggle of Parliament in revolt from a long tutelage, to win for itself an assured predominance in the mechanism of the state. The book is the result of a course of lectures delivered by the author as deputy for the Regius Professor of Modern History in the University of Cambridge during the academic year 1926-7.

In the introductory lecture we at once meet his conception of his subject which he regards as an 'historical drama'—'a conception which can be nowhere more fruitfully applied than to the history of the seventeenth century.' His treatment is therefore chronological. 'It is no longer possible,' we are told, 'as in the Tudor period, to trace the process of organic change as it goes on in separate institutions; it is now necessary to follow a story and to watch an unfolding plot.' The work is prefaced by a chronological summary of the period according to the main divisions into which it falls. The first chapter contains a survey of the social and ecclesiastical revolutions under the Tudors and of the successful surmounting of national dangers. The stage has been prepared for the actors of the following century; and the conflicts which are analyzed in the rest of the book might have been predicted by a perspicacious onlooker. Religious and constitutional difficulties, prominent from the beginning, claim two chapters. The first seventeen years of Charles I's reign are dealt with, under the usual heads, in four discourses. The constitutional history of the Civil War is analyzed in chapters 8 and 9, and the next three chapters are devoted to the Purged Parliament, the Parliament of the Saints, and the two Parliaments of the Protectorate. The Restoration, the Pension Parliament, and the great party struggle over the Exclusion Bill follow; while the final discourse is reserved for the Revolution of 1688. The book concludes with a useful bibliographical note and appendices containing a more detailed account of cases and trials—which are of special constitutional value.

Dr. Tanner's book should serve as an admirable prefatory survey of the struggles between the Stuarts and their parliaments, and provide a basis for further study of the documents of the period. Passages are freely quoted from the documents; and it is largely by his judicious use and careful selection of quotations, together with a sympathetic appreciation of personalities, that Dr. Tanner is able to reproduce the historical atmosphere of the century and to construct an historical background for his readers. One feels throughout that the historian brings to the treatment of his subject that sympathetic understanding of men and their

motives, their qualities and their limitations, which is peculiarly important during these formative years where there is so much material for conflicting opinions not only on points of legal fact and theory, but in the estimation of men and character.

The lucidity of his style and an agreeable undercurrent of sympathetic, almost Chaucerian, humour, renders his narrative always fresh and interesting and enables him to escape that ponderousness to which his subject-matter might so easily lend itself. The book will be most valuable as a scholarly and suggestive summary of a century of complicated but continuous historical evolution.

P. M. H.

White and Tudor's Leading Cases in Equity. Ninth edition. By E. P. Hewitt, LL.D., K.C., a Bencher of Lincoln's Inn, and J. B. Richardson, M.A., LL.B., of the Middle Temple, Barrister-at-Law. In two volumes. 1928. Sweet & Maxwell, Ltd. (£4 10*s.*)

'White and Tudor's Leading Cases in Equity' belongs to that limited circle of legal textbooks which may be said to be an essential part of the equipment both of the student and the practitioner. The work was one of the earliest products of a movement commenced by that very learned and accomplished lawyer, John William Smith, of expounding the law by cases illustrating leading principles, followed by elaborate notes showing the various applications of the principle exemplified. The first edition of 'Smith's Leading Cases on Various Branches of the Law,' usually known as 'Smith's Leading Cases on the Common Law,' was published in 1837, and Messrs. Frederick Thomas White and Owen Davies Tudor followed, in 1849, with the first volume of their 'Leading Cases in Equity.' The second volume, the work of Mr. Tudor, was published in the following year. The same learned author subsequently published two further collections of leading cases—on Mercantile and Maritime Law and on Real Property and Conveyancing. Since their first appearance, the Equity Cases have become what may be described as the Equity Student's Bible. The subject is one which in a peculiar degree rests on the authority of cases. As Professor Maitland points out, Equity consists of a 'collection of appendixes' to the Common Law 'between which there is no very close connexion,' and each appendix has been the result of some leading case, so that the subject naturally lends itself to exposition under a series of cases by which the various principles have been established.

The new edition appears to us, on the whole, to have been edited with the care and discretion which the names of the learned editors would lead us to expect, but it may perhaps be regretted that they have not been more enterprising in abandoning obsolete matter and have not availed themselves of the opportunity afforded to substitute for some of the older cases modern cases in which equitable principles are applied to the practical problems of the present day. Thus, as an example only, under the heading of *Donatio mortis causa*, the old case of *Ward* v. *Turner* might with advantage give place to some more recent case on the subject such as *Re Dillon* (1890) 44 Ch. D. 76.

It is almost inevitable that in editing a work of these dimensions

oversights should occasionally be met with, and this edition is not exceptional in this respect. But we must express surprise at the absence of any reference to the important case of *Nocton* v. *Ashburton* [1914] A. C. 932.

D. T. O.

Negligence in Law. By Thomas Beven. Fourth edition. By William James Byrne and Andrew Dewar Gibb. Two vols. Sweet & Maxwell, Ltd. London: 1928. ccxi and 1638 pp. (£4 10*s*.)

The first edition of Beven was in 1889, the second in 1895, the third (and last by the author) in 1908. These dates are material to the question, 'Was it advisable that another edition should be published after the author's death?' Of the ability of the book there is no question. One might demur to the author's assertion that he was not writing a complete treatise on negligence in law, one might doubt the plan upon which he arranged it, one might disagree with some of his conclusions; but the complete thoroughness of his investigation of the authorities and the acuteness of his reasoning at once gave the monograph a solid reputation with the profession, and lifted it far above the mass of pedestrian books which abound in our legal literature for the benefit chiefly of practitioners. But twenty years have slipped by in which so much fresh thought, judicial and extra-judicial, has been applied to the host of topics with which Beven dealt, that several parts of the book need serious reconsideration, if not actual revision. An edition on these lines would have been so heavy a task that we doubt whether anyone would have undertaken it. As it is, the learned editors have perhaps done wisely in making it their object 'to preserve all that is unique in this book and to make as few changes as possible.' If they had wished to probe some of Beven's theories on both the historical development, and the existing rules, of the law, there would have been plenty of material for helping them in the enterprise. Thus on the very first page the learned author said of negligence that 'it deals with an aspect, not with a division of law.' With respect to the law of torts, it is submitted that even in 1889, this was no more than a half-truth, and that the last forty years have accentuated this criticism. From the early nineteenth century onwards a dichotomy of meaning is distinctly traceable and is now clearly marked in negligence in the law of torts. It may signify one mode of committing some (but by no means all) torts; but it may also signify an independent tort of 'negligence.' In this latter sense it is just as much a 'division' of the law of torts as assault and battery, defamation, or any other tort which has gained a special name and peculiar characteristics. Sir Frederick Pollock perceived this long ago, and the thesis was fully developed by another writer in 42 *Law Quarterly Review*, 184—201, in 1926. No one, so far as we are aware, has publicly taken up the gage there thrown down, and indeed the view has been expressly adopted in the recent edition of Salmond's *Law of Torts*. One consequence of this aspect of negligence is the separation of it as an independent tort from nuisance, a process certainly recognized in fairly recent decisions, but of which Beven's note (p. 426) gives no hint.

Again, the historical note on *actio personalis moritur cum persona* (p. 238) needs revision. It is said that Pollock and Maitland give the early history of the maxim. They do not, and for the very good reason that the maxim is untraceable in the period treated by their *History of English Law*. No reference is made to Professor Holdsworth's examination of the subject, and Beven's text itself is unsatisfactory as tending to confuse the rule in *Baker* v. *Bolton* with the very different common law rule as to extinction of an action in tort (other than one inflicting death) by the death of either party. One wonders what was the source of Beven's remarkable theory—harsher critics might call it wild conjecture—of the origin of the rule in *Baker* v. *Bolton* (pp. 240—241).

The editors indicate that they have omitted most of the references to American law. No doubt there is some force in the arguments which led them to take this course, but it is impossible for those who have some knowledge of the skill with which some American writers and judges have treated negligence not to regret this. And the regret is sharpened by the reflection that there is no tendency in the English Courts to ignore the best of the decisions in the United States Courts, or at least to respect arguments founded on them.

This edition, then, is chiefly valuable for the reckoning which it has taken of judicial decisions since the last edition. Some of them might have been given a little fuller discussion; *e.g. Admiralty Commissioners* v. *S.S. Volute* [1922] 1 A. C. 129, seems to be disposed of in a footnote of three lines.

P. H. W.

The Law of Torts. By the Right Honourable Sir Frederick Pollock, Bart., K.C., D.C.L. Thirteenth edition. London: Stevens & Sons, Ltd. 1929. (£1 10*s*.)

An Analysis of Pollock's Law of Torts for Students. By J. K. Mannooch, LL.B. Fourth edition. London: Stevens & Sons, Ltd. 1929. (6*s*.)

The present edition of this authoritative work makes very few additions to the previous edition, issued in 1923. There are some valuable comments on the effect of the *Polemis Case* (pp. 37 to 39) in which the learned author expresses the view, agreeing with the observations of Professor Winfield in his edition of 'Salmond on Contracts,' that the decision in that much-discussed case is open to reconsideration. 'The result,' he says, 'surprising as it may seem, appears to be that the judgments in the *Polemis Case* were delivered *per incuriam* as regards the nature of the cause of action, and the reasons given are only extra-judicial opinions fully open to reconsideration, and perhaps not binding even in Courts of first instance.' The sections of the work dealing with trade combinations and wrongs incidental thereto have received revision with reference to the recent cases of *Sorrell* v. *Smith* [1925] A. C. 700, *Hardie & Lane, Ltd.* v. *Chilton* [1928] 2 K. B. 306, and *R.* v. *Denyer* [1926] 2 K. B. 258. The author agrees with Mr. Goodhart (L. Q. R. (1928) 436) that the latter decision is wrong. His view of the difficult questions arising from persuasion and advice acted upon to the damage of third persons, which

have been before the Courts in a number of recent cases, is admirably summarized on p. 347.

The Trade Disputes and Trade Unions Act, 1927, is printed in the Appendix, as the author says, 'by way of abundant caution,' as the declaration of the illegality of certain objects and purposes and acts done in furtherance of them may affect civil litigation.

Mr. Mannooch's Analysis serves as a most useful companion volume to the main work. It has been, and is, a great boon to students.

D. T. O.

The Law of Torts. By Sir John W. Salmond. Seventh edition. By W. T. S. Stallybrass. London: Sweet & Maxwell, Ltd. 1928. xlvii and 688 pp. (£1 10*s*.)

To foreign observers it has been a matter for amused wonder that a people who pride themselves on their love of liberty should continue to flounder in the morass of uncertainty and confusion which is created by the English law of torts, when it is in their power to remedy its defects. This is not the place to discuss the historical and other causes for this mischief; but the chief reason for the pre-eminent success of the late Sir John Salmond's treatise since its first appearance some twenty years ago, was the fact that its author, well qualified thereto by the composite nature of his training, made a conscious effort to improve the law, not only by revealing broad principles on which the chaos of details could be shown to depend, but also by courageous suggestions for the elimination of anomalies. He came to definite conclusions, and by his attractive and lucid style left no doubt as to what these were. The result was a book which has been indispensable to students, valuable to practitioners, and an often acknowledged assistance to the Bench. Naturally, his views could not always meet with agreement, but a new edition of the book has always been eagerly expected. It is therefore high praise to say that Mr. Stallybrass, to whom, through the lamented death of the author, the production of the present edition has been entrusted, does not disappoint that expectation. The standard of the past has been fully maintained by him and the new material has been most skilfully spliced on to the old. In his preface the editor explains fully to what extent, in addition to changes necessitated by recent cases, he has found himself compelled to differ from the author's views, and thus avoids the somewhat disturbing use of square brackets in the text to distinguish what is new. The care and labour bestowed by Mr. Stallybrass on the book are evidenced not only by the large number of additional cases given and by many new citations of early authorities, but also by the abundant references to the publications of modern jurists, particularly those of America, which are assuming such importance at the present day as to give rise to the opinion that it is to the work of academic lawyers that we must look in future for the removal of the defects of our legal system. Certainly there is little to hope for from the legislature, while a consideration of modern judgments, in tort cases at any rate, leads to the sad if respectful conclusion that confusion has been increased rather than diminished by judicial opinions which are there displayed in such conflict. The difficulties of editing another's work are generally recognized, and Mr.

Stallybrass is therefore to be congratulated on the highly successful performance of a formidable task. But he is also to be thanked for the assistance which his labours will afford to the cause of law reform.

J. W. C. T.

The Inquiring Mind. By Zechariah Chafee, Jr., Professor of Law in Harvard University. New York: Harcourt, Brace & Company. 1928. xii and 276 pp. ($2.50.)

This collection of addresses and essays, most of which have appeared in periodicals, is in essence a supplement to the author's well-known study, *Freedom of Speech*, published in 1921. In his earlier work Professor Chafee examined the theoretical and historical bases of liberty of discussion and applied the fundamental principles to events between 1917 and 1920. In the present book he considers some of the problems in respect to free speech which have arisen during the last seven years, reviewing successive judicial decisions in American Courts. Save for cases relating to searches and seizures all the important decisions of the Supreme Court of the United States are included in the survey, which also deals with several cases of interest decided by State Courts. Material on the earlier history of some of the topics considered will be found in *Freedom of Speech*. Most of the essays in the present collection are attempts to ascertain the proper scope for freedom of speech in various definite situations; and, since recent problems in respect of free speech in the United States have not as yet been considered on systematic lines in any other work, *The Inquiring Mind* will be welcomed by all who study seriously the constitutional and legal safeguards of liberty in the American Republic.

Readers of Professor Chafee's previous writings have learned to expect from him not only careful research, but also a frank and impartial attitude towards all controversial matters. His own position in regard to the subject-matter of the present book he has expressed in the preface. 'This book,' he declares, 'sometimes reaches the conclusion that an unpopular group has been badly treated. That is no reason for the assumption that the author shares the beliefs of that group. . . . In order to avoid any misapprehensions that I am a socialist, a communist, an anarchist, an I.W.W., or an atheist, let me intrude my personal views and deny participation in the intellectual views of all or any of these various groups. . . . My sympathies and all my interests and associations are with people who save, who manage and produce. But I want my side to fight fairly and wisely, and I regard some of the methods hereafter discussed for safeguarding the existing political and economic system as distinctly short-sighted or unfair fighting.'

The academic address on 'The Inquiring Mind' (pp. 1-21), which gives the title to the present collection, expresses in fact one of the author's own characteristics. His inquiring mind, which is at the same time a mind devoted to the pursuit of truth and justice, leads him to envisage the problems of constitutional liberty in all their bearings and to place before the public sound arguments for the reform of methods which now fail in many respects to ensure life, liberty, and the pursuit of happiness to all the citizens of the Republic. In another academic address, 'Give your Minds Sea Room' (pp. 22-39), he carries his thought a stage further,

holding that the Inquiring Mind must be joined with the Constructive Mind. In the next following fourteen essays (pp. 40-216) the learned Harvard Professor of Law subjects recent judicial decisions to a searching examination. He reviews, among other cases, *Gilbert* v. *Minnesota*, the *Milwaukee Leader Case*, the *Rand School Case*, the California I.W.W. Injunction, *Ziang Sung Wan* v. *United States*, the *Gitlow Case*, the *Bimba Case*, *Whitney* v. *California*; and, among the subjects which he considers in relation to these and other cases, are free speech and States' rights, compulsory confessions, criminal syndicalism, the freedom of the city, the Interchurch Steel Report, company towns in the soft-coal fields, the labour injunction, strike injunctions obtained by coal operators, and strike injunctions obtained by the United States. The final portion of the volume is devoted to certain of the author's reviews of recent books. The essays of this character are entitled 'The State and its Rivals,' 'Liberty under Socialism,' 'Mill To-day,' 'The British Empire,' 'Woodrow Wilson,' 'John Marshall,' and 'The Economic Interpretation of Judges.'

The reading of Professor Chafee's book will prove to be a good exercise for any inquiring mind. Such a mind will derive from this exercise information and enlightenment, and, if such a mind be also a constructive mind, it will not dwell too long on certain actual conditions which indicate a partial lack of liberty and justice, but will seek for remedies both in social and political reform and in constitutional and legal readjustments.

H. D. H.

Stephen's Commentaries on the Laws of England. Nineteenth edition. Radically revised and largely rewritten. General editor: G. C. Cheshire, D.C.L., M.A. Consulting editor: Sir John Miles, B.C.L., M.A. 4 vols. Vol. I (Introduction; Courts and Procedure; The Law of Persons). By F. H. Lawson, M.A. Vol. II (The Law of Property). By G. C. Cheshire, D.C.L., M.A. Vol. III. (Contracts and Torts). By C. H. S. Fifoot, M.A.; C. K. Allen, M.A., and G. C. Cheshire, D.C.L., M.A. Vol. IV (Criminal Law; Constitutional and Administrative Law). By C. H. S. Fifoot, M.A., and F. H. Lawson, M.A. London: Butterworth & Co. Ltd. 1928. (£6 6*s*.)

'Radically revised and largely rewritten' correctly describes the new edition of this well-known textbook, which can claim, more or less legitimately, to be in the direct line of descent from 'Blackstone's Commentaries.' The work was largely recast and rewritten when the seventeenth edition was published in 1922 under the general editorship of Professor Edward Jenks, and the process of revision has been carried so far in the present edition that very few vestiges of the original work remain. It would seem desirable, therefore, that the historic fiction involved in the title of the work should also be made the subject of revision when another edition of the present work appears.

In a work of this extent it would not be difficult by careful examination to find faults, both of commission and omission, and in the course of its

perusal we have come across occasional instances of both; but in no case have we found any statement that is calculated seriously to mislead the student and we can cordially recommend the work as the best introduction to the study of the present English law which we have read. Vol. II on the Law of Property, the work of Dr. Cheshire, we think preferable as an introductory textbook for students to his larger work on Real Property, excellent as that is. But, in the earlier pages, in an effort to generalize with intractable material, he commits himself to some statements which, to say the least, are most debatable (*e.g.* on p. 43, as to the tendencies which have characterized the English law of property; and on p. 52, 'Thus the doctrine of estates is now applicable to personalty,' which is hardly consistent with what is said on p. 14).

A valuable feature of the new work is the historical introduction to the Law of Contracts and Torts by Mr. Fifoot at the beginning of Vol. III. This is excellent and adds much to the completeness of the treatment of that section of the subject-matter.

D. T. O.

The British Year Book of International Law, 1928. Ninth Year of Issue. Humphrey Milford. Oxford University Press. (16*s*.)

This annual volume has become a necessary part of the equipment of every student of International Law. In addition to the leading articles, it contains summaries of decisions, opinions and awards of International Tribunals, and decisions of National Tribunals during the year 1927, and a most useful Bibliography and Summary of Events for the same year. In the Notes, which have formed a valuable feature of the Year Book since its inception, there are full critical comments of the important case of *The Lotus* and of the *Fagernes Case* [1927] P. 311, besides much other matter of great interest. Among the leading articles we particularly call attention to that of Sir John Fischer Williams, which deals with the very controversial subject of the expropriation of the property of aliens, Professor Pearce Higgins's discussion of the Treatment of Mails in Time of War, and Dr. Arnold McNair's paper, interesting alike to the student of Constitutional as well as the student of International Law, on the necessity of legislation to the validity of Treaties of the British Government. But all the articles, as usual, are of a high standard and deal with topics of great interest. It is also encouraging to observe that two of the contributions are by ladies who are doing work of distinction on the subject.

D. T. O.

'Law Notes' Year Book, 1929. An Alphabetical Digest of the Chief Statutes, Rules, Orders and Cases of the Year 1928. By the Editors of 'Law Notes.' 'Law Notes' Publishing Offices. 1929. (7*s.* 6*d.*)

The Property Statutes Up-to-date. Being a Supplement to the second edition of the 'Law Notes' Guide to the New Property Statutes. Second edition by H. Gibson Rivington, M.A., Oxon, and A. Clifford Fountaine. (2*s.* 6*d.*)

The resumption of the publication of the *'Law Notes' Year Book* will be welcomed by students and practitioners alike. It furnishes a most useful synopsis of the cases and legislation of the year. The utility of the present issue is much enhanced by the inclusion of references to the Statutes and Rules issued during 1925-1927, the period during which its publication had been suspended.

The *'Law Notes' Guide to the New Property Statutes* is, in our opinion, by far the best manual yet issued for the study of the recent property legislation. The Supplement, which contains all decisions on the Acts so far reported, and the new Rules and Orders, adds to the debt of gratitude we owe to the authors of the Guide.

Goodeve and Potter's Modern Law of Real Property and Chattels Real. London: Sweet & Maxwell, Limited. 1929. xxxv and 684 pp. (£1 7*s.* 6*d.*)

In the upheavals and vicissitudes of real property law during the last seven years, any editor might be daunted at the prospect of editing a book whose last (fifth) edition appeared not less than twenty-three years ago. Yet Mr. Harold Potter in calling this a new work has accepted the *damnosa hereditas* of a known and obsolete work; and though most of the assets provided would seem to be his own, yet he has succeeded in his difficult task in no uncertain fashion. He has preserved much of the scholarliness of the original, and yet has shown such ability in his general treatment of the subject as must make the perusal of his book a sound piece of reading for a student who aims at achieving the wider outlook. This may certainly be ranked among those second books to read which more than double the reward for the time and intellectual effort demanded. Mr. Potter has a clear and comprehensive knowledge of the new law, and only very rarely fails in clearness of expression. As illustrating what is here generally stated, Chapter XXII (Statutes of Limitation) may be cited. As treated by the first author, this has always stood out as an example of the larger and more scientific legal exposition: the jurisprudence of the old law and its connexion with the new seemed to be set forth in such happy balance. And of this charm, nothing has disappeared in the rehabilitation of the old work. Similarly, in Chapter XVII the original brief and exquisitely clear statement of the old and new law of mortmain has been retained almost unaltered. It is a good thing to have retained in the chapter on concurrent ownership

the classical statement about their respective seisins, as these are likey to be of practical importance for many years yet. But it is suggested that the author is a little over-positive in his *dictum* to the effect that joint tenants alone have the powers of disposition on trust for sale. There are minor slips in other matters, as where entailed interests in chattels apart from any settled land are alleged to be held on trust for sale; whereas power is indicated. On p. 232 (the chapter on equitable interests generally) the author says, 'Hence the trustee is under what may be described as a semi-contractual obligation to the beneficiary.' Contractual obligation we know; quasi-contractual obligation is also (somewhat less) familiar: but what is a semi-contractual obligation? If the author means that the *cestui que trust* has an enforceable *ius in personam* against the trustee, then he is speaking of such an obligation as arises by some act in the law not amounting to agreement. This is quasi-contract. Why not call it so?

It is hoped that when a second edition is called for the author will be prepared to consider the propriety of altering this. And that a second edition will be called for is a sure inference from the merits of a good book happily reborn.

F. C.

A Selection of Cases on the Law of Trusts. By Sidney Earle Smith, of the Osgoode Hall Law School. Toronto: Canada Law Book Company, Limited. 1928. xiii and 540 pp.

In 1927 Dean Falconbridge, of the Osgoode Hall Law School at Toronto, published *A Selection of Cases on the Sale of Goods*, the first of a series of case-books for use in Canadian law schools. The present collection, edited by Mr. Smith, is the second of the series. It should prove to be, as no doubt the first collection has already proved to be, a valuable aid in the teaching of fundamental rules and principles of law on the case-method in the law schools of Canada. Although the majority of the cases are judgments of English Courts, the editor has wisely included a considerable number of Canadian cases. Since there is no Canadian text-book on the law of trusts, this feature of the present collection will make a strong appeal to teachers and students in the law schools of Canada.

The editor, who acknowledges his indebtedness to the case-books and articles of two Harvard teachers, the late Dean Ames and Professor Austin W. Scott, has accomplished his task in the spirit and on the method of those masters of the law of trusts. He has wisely omitted some of the so-called 'leading cases' and substituted for them later cases which state and apply their doctrines; he has properly reproduced the judgments *ipsissimis verbis*; and he has illumined the growth and application of judicial doctrines by including not only selections from *Doctor and Student*, Bacon's *Reading on the Statute of Uses*, and other secondary authorities, but also parts of statutes, notably the Statute of Uses and the Statute of Frauds. Throughout the volume the editor has also added valuable notes of his own, which contain references to cases and authorities not included in the collection. The cases are arranged in an orderly sequence, in which historical development and logical arrangement both receive due recognition. In the Appendix portions of the Trustee Act,

1927, are reproduced. The List of Cases and the Index are useful guides to the contents of the volume.

While Mr. Smith's collection will be chiefly useful in Canadian law schools, it will also be welcomed by English and American teachers of the law of trusts. In view of the fact that the volume contains many English authorities, it might also be employed with profit in English schools of law.

H. D. H.

A Treatise on Deeds. By Robert F. Norton, K.C., of Lincoln's Inn. Second edition by the late R. J. A. Morrison, LL.D., and H. J. Goolden, both of the Inner Temple. 1928. Sweet & Maxwell, Ltd. 772 pp.

The legal profession will welcome a second edition of this massive treatise, a worthy successor of similar products of the eighteenth and nineteenth centuries, which did so much to reduce to order the chaos of real property law.

It is not to be expected that any lawyer, even a reviewer, will read such a book from cover to cover, at a series of sittings: its merits must be judged by the degree of helpfulness shown by the discussion of disconnected topics taken at random. Having approached the book in this way we conclude that the publishers have not overstated the case as grossly as might appear when they announce on the wrapper that "so wide is the scope of the book and so miscellaneous its contents, that there are few legal questions upon which some useful guidance could not be obtained from its pages." The guidance will generally be found to consist in reference to relevant extracts from classic text-book writers or from judgments. There is not a great deal of connected discussion or criticism of the conclusions of others.

The book is obviously not one which students will buy. But they will find it useful to look through the first 150 pages, which contain much matter that is applicable to all deeds. We suggest to the publishers that a book for students, embodying the subject-matter of those pages, would fill a useful gap. At present the student has to rely on the meagre treatment of deeds which the text-books on the law of property and conveyancing afford.

H. A. H.

A History of the English Bar and Attornatus *to* 1450. By Herman Cohen, of the Inner Temple. Sweet & Maxwell, Ltd. 1929. 622 pp. (£1 10*s.*)

Mr. Cohen needs no introduction to the older generation of Cambridge lawyers, who will welcome the appearance of the results of his researches into the professional life of the Middle Ages. In the matter put before them readers will not be disappointed, but there is perhaps a danger of their being misled by the title into expecting a more connected story than is actually available. The author indeed describes his work as a compila-

tion: not inappropriately, for it consists of a series of comments on particular topics, arranged under headings, without numbered chapters. Such a book is tempting to read in, rather than to read through; every London club should have it on its shelves for its legal members to browse in. Few of them, probably, could give reasons for the expressions advocate and attorney; the author will stimulate their appetites for information of this kind. The most interesting section from the point of view of the legal historian is that dealing with the relation between attorneys *narratores* and *servientes* (pp. 322 to 341). There are also sections which will be found useful by those who wish to compare the development of the legal profession in England with that on the continent.

H. A. H.

A Digest of Equity. By J. A. Strahan, M.A., Hon. LL.D., of the Middle Temple, Barrister-at-Law, etc. Fifth edition. 1928. London: Butterworth & Co. (22*s.* 6*d.*)

A new edition of Mr. Strahan's well-known work upon English Equity will be welcome to many. For many years earlier editions of this book have been used by countless students of law, and the practising lawyer has often found in it sufficient detail to be of great assistance to him. The standard of the earlier editions is fully maintained in the present volume, which is especially valuable as embodying the changes brought about by the new Property Acts, which came into force in 1926. As the author himself states, this new legislation is concerned principally with the rules of the Common Law. Nevertheless, in many respects the rules of Equity have been profoundly altered and in the law of trusts and of mortgages the direct changes have been considerable. These changes are admirably dealt with in this volume.

From the point of view of the law student, it is perhaps regrettable that more space has not been devoted to the historical development of Equity. An adequate historical background is invaluable, if not indispensable, to any student of Equity and this background could hardly be acquired from the present work.

The arrangement of the subject-matter is clear and systematic but the result is hardly a very readable volume. Accuracy and readableness, however, are not always easy to combine and Mr. Strahan is to be congratulated on a very valuable exposition of equitable principles.

H. C. W.-T.

Handbook of Roman Law. By Max Radin, LL.B., Ph.D., Professor of Law, University of California. St. Paul, Minnesota: West Publishing Co. 1927. xvi and 516 pp.

Professor Radin has succeeded admirably in accomplishing his purpose to write 'a brief and simple introduction to a large and difficult subject.' His *Handbook of Roman Law*, published in the 'Hornbook Series' of elementary treatises on subjects of the law, will be useful to students and enlightening also to lawyers.

After giving an outline of Roman history (pp. 4-15) and a sketch of the constitutional and legal history of Rome (pp. 16-104) Professor Radin deals systematically with the several branches of private law (pp. 105-466) and considers briefly the criminal law (pp. 467-476). The concluding chapter is on 'The Study of Roman Law' (pp. 477-485).

Professor Radin's book has not been composed with the intention that it should be a rival of Girard's *Manuel de Droit Romain* or Dr. Buckland's *Textbook of Roman Law*, but it is an excellent beginner's book and, if it be read from cover to cover in a serious spirit, it will inspire students with a desire to master those more elaborate treatises. To those who have some acquaintance with the Anglo-American system of law it will make a special appeal, for at many places the learned author has illustrated Roman concepts by reference to principles and doctrines of the Common Law. It is to be observed, moreover, that Dr. Radin, having an independent and critical mind, has not slavishly followed the writers whose works he has consulted. He criticizes, for example, one of Mommsen's well-known positions in regard to the Roman law of corporations and advances his own views (pp. 268-269).

H. D. H.

Wheaton's Elements of International Law. Sixth English edition, revised throughout, considerably enlarged and re-written by A. Berriedale Keith, D.C.L., D.Litt. Two vols. London: Stevens & Sons, Ltd. 1929. lxxxvii and 1347 pp. (£3 3*s*.)

Unfortunately this book was received for review on the eve of the *Journal's* committal to the press, and it would have been more satisfactory to hold over any notice of it for the next number. As, however, this would have involved a delay of a year, we have preferred to review it here, though what is said must of necessity be short and rather inadequate.

Professor Keith's task was a sufficiently severe one, for, though the previous edition was published in 1916, it was impossible for it to take more account of the events of the war than to make 'some allusions to those violations of established usage which marked even the early months of the contest.' The learned editor has wisely cast overboard some of Wheaton's matter which, written nearly a century ago, had become useless except for historical purposes; a particular example is Wheaton's rationalistic theory of international law. It is therefore by its treatment of occurrences during, and after, the war that this edition must be judged, and, having tested it in this way on several of the leading topics, we have no hesitation in stating it to be highly satisfactory. Indeed, at one moment we felt some regret that such heavy labour should have been embodied in bringing up to date a book written in 1836 rather than in composing an independent work of the editor. The justification must be the importance which is attached by the chanceries of Europe and America to international law books which have an established reputation, especially to classics of their own nationalities. The careful and complete documentation of this edition is notable, and it includes an *addendum* on a subject so recent as the restoration of the Pope to the rank of a territorial sovereign. On

several matters Professor Keith is already well-known as an expert; such are the position of the British Dominions and the thorny problem of State Succession.

One point might be considered for the next edition. *The Caroline* (1841) is discussed not only under 'Self-preservation,' which is undoubtedly its appropriate heading, but also under 'Violation of neutral territory' (p. 932). We have indicated elsewhere our opinion that this seems to be a mistake; for the rebellion in Canada did not become a war, and questions relating to neutrality are therefore irrelevant.

May we conclude with entire concurrence in Professor's Keith's statement in connection with the bibliography of international law that what is needed at present is 'a critical bibliography in which works of permanent value will be discriminated from the mass of ephemeral literature—an undertaking of the most formidable character.'

P. H. W.

Justice and Administrative Law: A Study of the British Constitution. By William A. Robson, Ph.D. London: Macmillan & Co. Ltd. (12*s.* 6*d.*)

It is now no longer correct to say that there is no *droit administratif* in English law, and to what extent administrative law has grown will be realized by all who read this interesting and able work. Dr. Robson has, however, not confined himself to wringing his hands and lamenting the advent of what is probably inevitable in a highly complex state of civilization where the rights and duties of individuals are so interlocked as they are in the modern polity. In *Justice and Administrative Law* he has, after pointing out the growth and the extent to which we are subject to the decisions of bodies other than the Courts of law, made a lengthy examination of the characteristics of judicial and administrative tribunals. At the end of the book there is a chapter in which he makes certain constructive proposals as to the methods which administrative bodies should adopt.

Dr. Robson's main point is that the characteristics of the judicial mind, confined hitherto to those who preside over our Courts and others who appear before them are spreading to others, and that in every case where decisions have to be made a body of doctrines tends to grow up and the discretion of the official who decides becomes subordinated to the rules by which he comes to be guided.

There are few works which we have read which strike us as so likely to be enjoyed and appreciated by lawyer and layman alike, and we can heartily recommend it to both as well for the importance of the subject as for the excellent treatment given to it.

R. L. A. H.

The Doctrine of Necessity in International Law. By Burleigh Cushing Rodick. 1928. New York: Columbia University Press. 195 pp. (20*s*).

This is a useful collection of the various cases in which the plea of necessity has been put forward as an excuse for the violation of a rule of international law. The subject is treated under the headings of the high seas, pacific intercourse of states, non-amicable modes of redress short of war, land and sea warfare and neutrality. The author has passed judgment on most of the incidents recorded, and generally speaking we are inclined to agree. The conclusions he formulates as to the legitimate limitations on the plea appear to be fair deductions from the evidence. 'Necessity' is used rather widely to include state policy as well as self-defence and self-preservation: the latter, surely, is rather in the nature of an instinct than a right. Though the author does not purport to attempt a discussion of the philosophical aspects of necessity, nevertheless the first chapter does give some account of the leading philosophical ideas associated with the development of the law of nations down to the time of G. F. von Martens. There is a lengthy bibliography and a very complete index, but for a book the text of which is only 120 pages, the price (20*s*.) appears to be excessive.

A. P. H.

Constitutional Law of England. By E. W. Ridges. Fourth edition. By Sydney E. Williams, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1928. xxi and 494 pp. (£1.)

In his previous edition Mr. Williams expressed a hope that the work might be a useful introduction to the study of constitutional law as it then stood. An examination of the work in that and the present edition leaves the impression that the editor has produced a useful summary of the various institutions which in the present contribute to the working of the government of this country and the Empire; he has also attempted to summarize the institutions of the past, less successfully because their history and significance cannot be adequately explained in the space at his disposal.

Ridges is commonly regarded as a suitable textbook for the Bar examination on constitutional law; it is not suitable for the Cambridge Tripos, and was probably never intended for use by honours students. There are several omissions of detail, *e.g.* at p. 63, the present franchise law is misstated; see Economy Act, 1926. But the chief defect is the scant treatment afforded to the real position of the twentieth century Executive, *e.g.* at p. 40 it is stated that there are *a few exceptions* to the equality of all persons before the law; and again, at p. 155 under 'Delegated Prerogative,' no attempt is made to illustrate the constitutional significance of delegated legislation; indeed the passage leads one to suppose that the author regards the statutory powers of government departments to be emanations of the common law prerogative; nor is the view expressed on p. 451, that by virtue of the prerogative the Crown conducts foreign

relations, strictly accurate. The Crown's position in foreign affairs is absolute at municipal law, but prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him; see *Re Ferdinand, ex-Tsar of Bulgaria* [1921] 1 Ch. at p. 139.

E. C. S. W.

The Principles of Real Estate Law. By N. W. MacChesney, LL.D., of the Chicago Bar; General Counsel, National Association of Real Estate Boards. Land Economic Series No. X. New York: The Macmillan Company. 1927. xlix and 891 pp.

This work possesses several features of interest to the conveyancer on this side of the water. It is striking to find that, despite the apparent simplicity of recording title to land, investigation of such title tends to occupy so important a place in the American realty lawyer's work; the specimen abstract dates from 1830 to 1924, but it serves a rather different purpose from our own abstracts, in that it appears to save reference to original records of title. The long section on co-operative apartments deals with an unfamiliar topic; each tenant-owner is both a member of a group in a joint realty project as well as an individual owner of one of the constituent apartments. The entire absence of reference to settlements or trusts for sale indicates the solution of a troublesome problem, as one would expect.

The whole volume is a manual, written by an authoritative hand, for the use of the various types of practitioners who deal with the affairs of 'realtors.' The precedents are illuminating; many are actual documents from the office papers of the author, a general as well as a specialist at the top of his profession; of particular interest is the form of income tax return, which achieves a comparative simplicity that might well be studied by the compilers of the latest form issued by our Board of Inland Revenue.

E. C. S. W.

Aspects of Dr. Johnson. By E. S. Roscoe. Cambridge University Press. 1928. (6*s*.)

Most people who take Dr. Johnson as their hero manage to write an interesting book. Johnson's character was by no means subtle, and appeals to a great variety of readers. He was an intense 'John Bull'—a lover of towns, though no town except London would have given him full satisfaction. He scrupulously avoids every sort of cant, because there was very little of the mystic in his nature; he preferred company to solitude. Mr. Roscoe tells us nothing very new, but he is suggestive, and touches on many subjects, grouped as follows: Johnson's Character, Some Comparisons, Johnson Out of Town. Johnson was primarily a talker; his talk and personality have left a deeper impression than any of his books. We ourselves are inclined to accept the somewhat trite view that he would have been forgotten by the general reader, except for Boswell's biography.

Like so many authors, he felt that to take a share in worldly affairs was more worth a man's while than merely to write books. Readers of this journal will naturally turn to the chapter, 'Dr. Johnson and the Law.' 'Sir, it would have been better had I been of a profession; I ought to have been a lawyer.' Mr. Roscoe shows that Johnson knew himself more truly than many men have been able to do. He was fond of argument often tending towards a sledge-hammer treatment; he used rhetoric, which is fast becoming obsolete except amongst advocates and Wesleyan ministers, yet his thought remained clear and his expression lucid. It was inevitable that a man of his character should consider the moral and professional position of a lawyer as advocate; his defence (like most defences) seems to us more or less open to the accusation of casuistry. He had that sagacity so necessary to the successful lawyer. He wrote a prayer for use before the study of the law, which shows how large a part religion played in his scheme of life.

A. H. J.

The American Law Institute's Restatement of the Law of Contracts. Chapters 1 to 7. 1928. The Institute, 3400 Chestnut Street, Philadelphia. 304 pp. ($2.50.)

We have received the first seven chapters of the official draft of one part of the important restatement of the law, namely, the Law of Contracts, which has been entrusted by the American Law Institute to a committee under the reportership of Professor Samuel Williston, than whom no more distinguished authority on the subject could have been found. The restatement takes the shape of a series of propositions in the form of a code followed by comment and, as a rule, by illustrations. An appendix contains explanatory notes on many of the sections and a collection of some of the leading authorities on which they are based. The principal emotion which most English lawyers will feel in reading this document is one of regret that their own profession does not contain the organization required for a necessary piece of work of this character, and that the proposal to create such an organization would at present meet with very little support.

First and Second Reports of the League of Nations Committee of Experts for the Progressive Codification of International Law. Geneva. 1927 and 1928.

In these reports will be found the fruits of the discussions of experts representing all the principal legal systems of the world in selecting the topics of international law most suitable for codification and in preparing those topics for that process, frequently by means of a draft convention. They contain also the replies of the Governments of most states to the questionnaires addressed to them by the Committee, and form a mine of information for the student, young and old, of international law. The League has decided to summon a conference at The Hague in 1930 in order to attempt a codification of three of the principal topics dealt with in

these reports, namely, Nationality, Territorial Waters, and Responsibility of States for Damage done in its Territory to the Property and Persons of Foreigners.

International Law as Applied to Foreign States. By Julius I. Puente, LL.M. Chicago: Burdett J. Smith & Co. xxiii and 299 pp.

This work, which is characterized by the study of judicial decisions rather than of historical and diplomatic material and therefore makes a particular appeal to the practising lawyer, deals mainly with the recognition of states, the suability of foreign states, ambassadors and public ministers, and treaties. Without having found time to examine the work in detail, we may be permitted to remark that it appears to contain in its one hundred and thirty pages on treaties a very considerable amount of valuable material which is either new or not readily accessible.

The Legal Effects of Recognition in International Law. By John G. Hervey, LL.B., Ph.D. University of Pennsylvania Press. Humphrey Milford. xiv and 170 pp. (12*s*. 6*d*.)

Dr. Hervey has chosen for his study one of the topics of international law which has most exercised the minds of American and English lawyers during the past decade, and one for which a mass of new judicial material is available. His examination of the American and English decisions will be of great value to the lawyers of the two countries, both practising and academic.

Patent Law and Practice. By A. W. Griffiths, B.Sc. (Eng.), Barrister-at-Law. London: Stevens & Sons, Ltd. 1928. (7*s*. 6*d*.)

This is a short outline of patent law which can be recommended as an introduction to a difficult and technical subject requiring a general grasp of the principles before the student may venture upon the weightier works on this branch of the law. Mr. Griffiths is to be commended for not confining himself to footnotes for his cases, and for giving in some detail many of the authorities in support of his general propositions, a practice which goes a long way towards lightening the difficulties of the student.

R. L. A. H.

Disney's Law of Carriage by Railway. Eighth edition. 1929. By Humphrey Mackworth Paul. (12*s.* 6*d.*)

A good book, written in a way that is very readable by the layman and yet giving the lawyer a great deal of useful information in a condensed form. The author handles very clearly such points as 'act of God,' and the extra liability to children.

The book deals very well with the recent Acts of Parliament in connexion with railways. There is a very good general index at the end. A great deal could be done with the Table of Cases; there are only references as to where to find them in the text; and when we turn to them we frequently find that the heading is set out in the text, and that there is no adequate reference below in the footnote. It is such a convenience to find the names of parties doubly indexed in a Table of Cases, with the date, and the reference.

H. B.

The Student's Conflict of Laws. Based on Dicey. By E. Leslie Burgin, LL.D. (Lond.), and E. G. M. Fletcher, LL.B. (Lond.). London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1928. (21*s.*)

The learned authors of this book are to be congratulated. They have fulfilled a difficult task in a very able manner. That the work will be of great use to students is undoubted, as the simplicity of its arrangement and the clarity of statement appears to us exactly what were required. Moreover, the utility of a book of this description to the solicitor in practice is obvious; and we can cordially commend it as providing a ready means of elucidation of matters which must be continually arising in modern practice owing to the great extension of international intercourse and business relations and the immense growth of the habit of travel among all classes.

H. T. Ll. R.

The Transactions of the Medico-Legal Society. Volume XXI, 1926—27 and Volume XXII, 1927—28.

This well-known series preserves its accustomed interest. The articles are all by persons well qualified to write them. The standard of work has always been high and is well maintained.

The article by Lord Riddell on 'The ethical, legal and medical aspect of abortion' is a thoughtful and valuable contribution upon a subject that is to-day obtaining an unhappy prominence and which cannot be shirked. The discussion that follows should be read (Vol. XXI, p. 49). In the same volume and by the same author there is a summary of the legal view on the 'Law and ethics of medical confidences,' which is an able and full survey of the position of a medical witness.

H. T. Ll. R.

Römisches Recht. Von Oberlandesgerichtsrat C. Schaeffer und Landgerichtsrat Dr. J. Wiesels. 1—8. Auflage. Verlag: C. L. Hirschfeld, Leipzig. 1929. 192 Seiten. Kartoniert, Mk. 4.25.

This little book is a typical 'Grundriss,' condensing all Roman law into 188 pages. The rules are classified like plants in the botanist's catalogue; by the middle of page 2 we have reached Book 1, Part 1, I, B, I, 1, a, d. This method enables the detailed rules to be stated very clearly and systematically, and the standard of accuracy appears to be high. But it is inconceivable that anyone should ever read the book through except on the eve of an examination.

P. W. D.

Guide to the Law Reports and Statutes. Published by Sweet & Maxwell, Ltd. 1929. 70 pp. (4*s.*)

This welcome book is the successor of Messrs. Stevens' & Haynes' Alphabetical Catalogue of Law Reports, which has long been out of print. It fills a want which has been urgently felt by legal writers. Any such person will buy it at sight.

It contains (a) an alphabetical list of English and Irish Reports, showing the abbreviations in current use, (b) a chronological list of English Reports arranged under Courts, (c) a table showing the date to which each volume refers issued since 1809, (d) a table of Regnal Years, and (e) particulars of the various editions of the statutes.

We cannot be too grateful to the unknown compiler.

H. A. H.

Everyday Statutes Annotated. An abridgment containing statutes of practical utility in force on January 1, 1929, with notes of cases bearing on their interpretation. Edited by S. E. Williams, of Lincoln's Inn. Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. 1929. viii and 890 pp.

A library edition in four volumes and a thin paper edition in two volumes have been announced, each at the pre-publication price of £6 6s. The price will be raised to £8 8s. on the publication of the final volume.

Volume I has been issued. It contains in the forefront the Interpretation Act, under the heading Act of Parliament, and statutes on the following subjects, Animals, Apportionment, Arbitration, Auction, Bankruptcy, Bastardy, Bills of Exchange, Bills of Sale, Carriers, Champerty, Charities, Copyholds, Copyright, and Criminal Law. The criminal law statutes fill pages 538—890. Students will find very useful the list of statutes noted under this title.

H. A. H.

Other books received (some will be reviewed in next issue):—

Cockle and Hibbert's Leading Cases in Common Law. Second edition by W. N. Hibbert, LL.D., of the Middle Temple. 1929. Sweet & Maxwell, Ltd. 959 pp. (£2 2*s.*)

Clerk and Lindsell on Torts. Eighth edition by W. A. Macfarlane and G. W. Wrangham, both of the Inner Temple. 1929. Sweet & Maxwell, Ltd. 827 pp. (£2 5*s.*)

Some Lessons from our Legal History. W. S. Holdsworth, D.C.L., K.C., Vinerian Professor in the University of Oxford, Fellow of All Souls College, and Bencher of Lincoln's Inn. Lectures delivered in 1927 at Northwestern University, Chicago. Macmillan & Co., Ltd. 196 pp. (8*s.* 6*d.*)

The Historians of Anglo-American Law. Lectures delivered in 1927 by Professor Holdsworth at Columbia University, New York City, on the James S. Carpentier foundation. Humphrey Milford. 175 pp. (14*s.*)

The Law of Banks and Banking, Clearing Houses, Currency and Dominion Notes, Bills, Notes, Cheques and other Negotiable Instruments. By J. D. Falconbridge, M.A., LL.B., K.C., Dean of the Osgoode Hall Law School, Toronto. Fourth edition. 1929. Canada Law Book Co. Ltd. Toronto.

Rent and Mortgage Interest Restrictions. Thirteenth edition. By the Editors of 'Law Notes.' 1929. (5*s.*)

National University Law Review. Vol. IX. No. 1. January, 1929. National University Law School, Washington, D.C.

Les mots à sens multiples dans le Droit Civil Français. J. Becquart, Docteur en Droit. Paris: Les Presses Universitaires de France, 49 Boulevard Saint Michel.

Das Pressrecht Grossbritanniens. Von Marguerite Wolff, M.A. 1928. Verlag: Von Georg Stilke, Berlin.

The Trial of Socrates. By Coleman Phillipson. 1928. London: Stevens & Sons, Ltd. (21*s.*)

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